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# *Race Relations Law Reporter*

**A Complete, Impartial  
Presentation of Basic  
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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# Recent Developments

## ... A Summary

### Education

A federal court determined that Negro students were justifiably and with due process expelled from an *Alabama* state college because of sit-in activities disruptive of educational procedures (p. 723).

The Eighth Circuit Court of Appeals affirmed an order denying specific relief to Negro children seeking admission to a Jefferson County, *Arkansas*, white school; but, rejecting a desegregation plan previously accepted by the district court, it remanded the case to require submission of another plan (p. 631). In the Little Rock case a federal district court, holding that there is no absolute right to assignment to a particular school because of residence proximity or any other single consideration, sustained the reassignment of two Negroes, who had attended a formerly all-white school during the 1957-58 year, to an all-Negro school because one had failed to adjust to the desegregated school and because the all-Negro school's physical arrangement is more compatible with a health impairment of the other (p. 615).

A grade-a-year school desegregation plan proposed for *Delaware* was held by the Fourth Circuit Court of Appeals not to comply with the "all deliberate speed" requirement (p. 637).

In a Negro student's suit to desegregate Escambia County, *Florida*, schools, requesting in part an order prohibiting the assignment of teachers and other personnel on account of race, a federal district court granted a motion to strike references to non-student personnel, holding that the *School Segregation Cases* apply only to student segregation (p. 645).

Effectuation of an approved plan for desegregating Atlanta, *Georgia*, schools was delayed until May 1, 1961, a federal district court explained, to allow the state time to make a decision preventing the closing of the schools (p. 651).

The *Louisiana* legislature adopted ten Acts concerning race relations in public education (pp. 857-868). A federal court in the New Orleans school case declared unconstitutional four of those Acts, as well as previous legislation requiring segregation in public schools and granting the governor power to close integrated

schools; and it stayed until November 14, 1960, a previous order requiring desegregation of New Orleans schools (p. 655). Other federal court decisions enjoined public school officials of East Baton Rouge (p. 653) and St. Helena (p. 654) parishes from requiring school segregation "after such time as may be necessary to make arrangements . . . with all deliberate speed," and enjoined the state board of education from excluding qualified Negro students because of race from trade schools (p. 652).

New York City instituted an "open enrollment" program whereby pupils entering schools having a high concentration of Negroes and Puerto Ricans may transfer to other schools utilized at less than 90 per cent of capacity (p. 911).

A federal district court approved a grade-a-year desegregation plan for Knoxville, *Tennessee*, schools but directed school officials to re-study the problem of making courses in a technical school available to Negroes (p. 670).

After Dallas, *Texas*, school officials submitted a grade-a-year desegregation plan and the federal district court suggested that it would approve a plan whereby separate schools would be set up for Negroes, whites, and those wanting integration, such a plan was submitted and was approved (p. 679). Another federal court rejected a similar plan for Houston school, ordering instead that they be desegregated a grade-a-year beginning in September, 1960; the Fifth Circuit Court of Appeals affirmed; and city officials acted to effectuate the plan (p. 703). West Texas State College was ordered to admit a Negro, who is a resident of Texas (p. 740).

Each of three *Virginia* counties, Floyd (p. 714), Grayson (p. 716), and Pulaski (p. 721), which had provided for secondary school education at institutions within their geographic boundaries for eligible white residents but which had sent Negro children to another county for education, were ordered to admit Negroes to the white schools on the same basis as white students.

### Employment

A fair employment practices act was adopted in *Delaware* (p. 889).

The Baltimore, *Maryland*, city solicitor ruled that a municipal employees association is a "labor union" subject to anti-discrimination ordinances (p. 903).

The United States Department of labor ruled that an international union in establishing a trusteeship over its Memphis, *Tennessee*, local, in order to require integrated meeting hall facilities, had done so to effectuate a legitimate objective of its constitution, and had not thereby violated the 1959 Labor-Management Reporting Act (p. 926).

### Governmental Facilities

The *California* attorney general notified cities of that state that the Professional Golfers Association's racial restrictions on membership precludes governmental agencies from extending special privileges to the association or individuals as members (p. 906).

The Mayor and the chief judge of the municipal court of Atlanta, *Georgia*, defendants in a federal court action seeking an injunction against alleged segregated seating in the municipal courtroom, moved to dismiss because such conduct affects a state court's internal affairs for which there is an adequate state remedy. The motion was granted (p. 791).

*Maryland* statutory requirements of separate training schools for delinquent minor Negroes and whites were held unconstitutional by a state court (p. 792).

### Housing

A *Georgia* state court held that the Savannah Public Housing Authority's alleged action of terminating white persons' leases in order to substitute Negroes was within its statutory power (p. 804).

The *Michigan* corporation and securities commissioner adopted rules prohibiting real estate agents from discriminating because of race, color, religion, national origin, or ancestry (p. 927).

*New York* ordinances forbidding the owners of multiple dwellings to deny accommodations on account of race, color, or religion were upheld by the state supreme court, which rejected a landlord's contention that they unjustifiably interfered with his property rights in his business (p. 803).

### Organizations

On a second remand from the United States Supreme Court, the *Alabama* Supreme Court remanded to a state circuit court an action by the state attorney general to restrain the NAACP from doing business in the state without complying with registration laws; and it directed that a 1956 temporary injunction remain in effect pending a determination on the merits. Dismissing an action by the NAACP alleging that Alabama officials were depriving it of constitutional and statutory rights, a federal district court noted that the United States Supreme Court had indicated the route the NAACP should take to secure a prompt trial; and it stated that a federal court should not exercise injunctive powers when an action is in a state court's "breast," as it would be assumed that state officials will observe their oaths to protect the constitutional rights of all (p. 809).

After the *New York* secretary of state refused to domesticate a foreign corporation on the ground that it is a pro-segregation organization precluded from doing business in the state by the general corporation laws, the supreme court declined to compel the secretary to accept the certificate of incorporation for filing, upholding statutes which allowed the secretary so to refuse (p. 808).

The *Virginia* Supreme Court of Appeals affirmed a decision refusing to enjoin a state committee from investigating NAACP activities and to require the committee to produce NAACP records allegedly in its hands (p. 817).

### Public Accommodations

A *California* court affirmed a decision that a gymnasium was not subject to public accommodations statutes upon a finding that it was not open to the general public (p. 831).

The federal district court for *Maryland* overruled the argument that, while an amusement park proprietor could refuse to serve whomever it pleased and could use "self-help" to eject Negroes who remained after ordered to leave, calling any state officer to remove or arrest them would violate the Fourteenth Amendment and civil rights statutes (p. 825).

Holding that a dancing school is not an educational institution within an exception to the *Massachusetts* public accommodations law, the state supreme judicial court upheld a judgment that it was subject to that law as a commercial

enterprise (p. 830).

A Kansas City, *Missouri*, ordinance forbidding racial discrimination in operation of hotels, motels, and restaurants was declared unconstitutional by a state court (p. 834).

The *New Hampshire* Supreme Court adhered to the common law rule that proprietors of a private calling may exclude whomsoever they choose, rejecting the contention that the court should change the law because of altered social concepts. Sustaining as declaratory of the common law a statute empowering a race track licensee to refuse admission to anyone whose presence is in his "sole judgment . . . inconsistent with the orderly and proper conduct of race meeting," the court, however, interpreted the statute to mean that such judgment cannot be arbitrarily exercised (p. 834).

An order of the *New York* State Commission Against Discrimination requiring a resort farm to eliminate the phrase "Serving Christian Clientele Since 1911" from an advertising brochure was set aside by a state supreme court (p. 837).

## Voting

A federal district court held that an *Alabama* state court lacked authority to enjoin the United States Attorney General from inspecting or copying records of county voter registrars, granted the Attorney General's application for an order to require the Montgomery County board to produce its records, and upheld Title III of the Civil Rights Act of 1960 as providing a clear and unambiguous standard and not being *ex post facto*. The Fifth Circuit Court of Appeals stayed the judgment and order (p. 766). A like application of the Attorney General was granted relative to the East Feliciana Parish, *Louisiana*, registrar; and the Fifth Circuit denied a stay (p. 774). Six Acts concerning elections were adopted by the *Louisiana* legislature (p. 880-885).

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## Miscellaneous

A district court decision that, in continuing segregated seating on buses after ordinances requiring such had been repealed, a Birmingham, *Alabama*, transit company was not acting under color of law in violation of Negroes' civil rights, was reversed by the Fifth Circuit Court of Appeals, which held that, by delegating to the franchise holder the power to adopt seating rules and by making the violation of such rules criminal, the city had made the company a state agent (p. 841).

A habeas corpus petition by a Negro convicted in an *Arkansas* state court, alleging systematic exclusion of Negroes from juries and non-appointment of Negroes as jury commissioners in the county where he was tried, was denied by a federal district court (p. 846).

The convictions of Pasadena, *California*, Negroes were reversed by a state appellate court decision that they should have been permitted to introduce alleged evidence of discrimination in criminal law enforcement (p. 845).

Recently adopted Acts of the *Louisiana* legislature make it a crime to go in or upon structures and other specified places after having been forbidden to do so by proper authority (p. 897); to solicit such conduct (p. 898), and to take possession of any part of a place or business or to remain therein after having been ordered to leave by the person in charge (p. 880). The *Massachusetts* attorney general advised municipal and police officials that interference with sympathy picketing for lunch counter sit-ins is "almost invariably illegal and unconstitutional" (p. 903).

A *New Jersey* court affirmed a decision that that state's courts could not through habeas corpus interfere with the governor's rendition warrant in an extradition matter, even though return of a prisoner to the demanding state would necessarily result in his incarceration in a segregated institution (p. 765).

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# TABLE OF CONTENTS

## United States Supreme Court

### Constitutional Law

#### FREEDOM OF SPEECH AND PRESS

*California: Talley v State, USSC, p 607*

Miscellaneous Orders, p 613

## Courts

### Education

#### PUBLIC SCHOOLS

*Arkansas: Aaron v Tucker, USDC, p 615*

*Dove v Parham, USCA 8th Cir, p 631*

*Delaware: Evans v Ennis, USCA 3rd Cir, p 637*

*Florida: Augustus v Bd of Public Instr of Escambia Co, USDC, p 645*

*Georgia: Calhoun v Latimer, USDC, p 650*

*Louisiana: Angel v La St Bd of Ed, USDC, p 652*  
*Davis v East Baton Rouge Parish Sch Bd, USDC, p 653*

*Hall v St Helena Parish Sch Bd, USDC, p 654*  
*Orleans Parish Sch Bd, USCA 5th Cir; Bush v Orleans Parish Sch Bd; Williams v Davis, USDC; State v Orleans Parish Sch Bd, Orleans Parish Civ Dist Ct, p 655*

*Tennessee: Goss v Bd of Ed of City of Knoxville, USDC, p 670*

*Texas: (Dallas) Borders v Rippey, USDC, p 679*  
*Ross v Peterson, USDC; Houston Independent Sch Dist v Ross, USCA 5th Cir, p 703*

*Virginia: Walker v Floyd Co Sch Bd, USDC, p 714*

*(Galax) Goins v Co Sch Bd of Grayson Co, USDC, p 716*

*Crisp v Pulaski Co Sch Bd, USDC, p 721*

#### COLLEGES AND UNIVERSITIES, SIT-INS

*Alabama: Dixon v Ala St Bd of Ed, USDC, p 723*

#### COLLEGES AND UNIVERSITIES

*Texas: Allred v Heaton, Tex Ct Civ Appls, p 730*  
*Shipp v White, USDC, p 740*

#### PRIVATE SCHOOLS

*Connecticut: Snyder v Town of Newton, Conn Sup Ct of Errors, p 741*

### Civil Rights

#### AIRLINE PILOTS

*Fifth Amendment: Airline Pilots Assn Internatl v Quesada, USDC NY, USCA 2d Cir, p 749*

### JUDICIAL IMMUNITY

*California: Johnson v MacCoy, USCA 9th Cir, p 750*

### LIMITATIONS

*Federal Statutes: Truitt v State of Ill, USCA 7th Cir, p 750*

### RESTRICTED SCOPE

*Federal Statutes: Byrd v Sexton, USCA 8th Cir, p 750*

### Criminal Law

#### AGE DISCRIMINATION

*New York: People v Munoz, NY City Ct Spec Sessions, p 762*

#### DISCRIMINATORY ENFORCEMENT

*California: People v Harris, Los Angeles Co Super Ct, p 762*

#### EXTRADITION

*New Jersey: Application of Lee, NJ Super Ct, p 765*

### Elections

#### REGISTRATION

*Alabama: State of Ala ex rel Gallion v Rogers, Montgomery Co Cir Ct; In re Crum Dinkens, USDC; In re Crum Dinkens, USCA 5th Cir, p 766*

*Civil Rights Act: U S v Assn of Citizens Councils of La, USDC, p 773*

*Louisiana: In re Palmer, USDC, USCA 5th Cir, p 774*

*New York: Camacho v Doe, Bronx Co NY Sup Ct, NY Ct of Appls, p 775*

### Employment

#### FAIR EMPLOYMENT LAWS

*Colorado: Colo Anti-Discrim Comm v Continental Air Lines Inc, Colo Sup Ct, p 778*

#### DISCRIMINATORY PRACTICES

*Kentucky: Jones v Distillery, Rectifying, Wine and Allied Workers Internatl, USDC, p 786*

### Governmental Action

#### NON-DISCRIMINATION

*Oregon: Wiley v Richland Water Dist, USDC, p 788*

### Governmental Facilities

#### COURTROOMS

*Georgia: Seniors v Arnold, USDC, p 791*



# TABLE OF CONTENTS

## TRAINING SCHOOLS

*Maryland: Myers v St Bd of Public Welfare, Baltimore City Cir Ct, p 792*

## Housing

### DISCRIMINATION

*New York: Martin v City of New York, NY Co Sup Ct, p 803*

### PUBLIC HOUSING AUTHORITY

*Georgia: Kennedy v Housing Auth of Savannah, Chatham Co Super Ct, p 804*

## Indians

### INDIAN LANDS

*New Mexico: U S in behalf of Pueblo of San Ildefonso v Brewer, USDC, p 807*

### JURISDICTION

*North Dakota: Matter of Holy-Elk-Face; State v Holy-Elk-Face, N Dak Sup Ct, p 808*

## Organizations

### MEMBERSHIP CORPORATIONS

*New York: Assn for Preservation of Freedom of Choice Inc v Simon, NY Co Sup Ct, p 808*

### NAACP

*Alabama: Ex Parte NAACP; In re State ex rel Gallion v NAACP, Ala Sup Ct; NAACP v Gallion, USDC, p 809*

*Florida: Fla Legislative Investigation Comm v Gibson, Graham, Leon Co Cir Ct 2nd Jud Cir, p 814*

*Virginia: NAACP v Comm on Offenses Against the Administration of Justice, Va Sup Ct Appls, p 817*

## Public Accommodations

### AMUSEMENT PARKS

*Maryland: Griffin v Collins, USDC, p 825*

### DANCING SCHOOLS

*Massachusetts: Crawford v Kent, Mass Sup Jud Ct, p 830*

### GYMNASIUMS

*California: Gardner v Vic Tanny Compton Inc, Cal Dist Ct of Appl, p 831*

### HOTELS, MOTELS, RESTAURANTS

*Missouri: Marshall v Kansas City, Jackson Co Cir Ct, p 834*

## RACE TRACKS

*New Hampshire: Tamelleo v N H Jockey Club Inc, N H Sup Ct, p 834*

## RESORTS

*New York: Trowbridge v Katzen, Ulster Co NY Sup Ct, p 837*

## Religious Freedom

### SUNDAY LAWS

*New Jersey: State v Fass, Hudson Co Ct, p. 839*

## Transportation

### PASSENGER SEATING

*Alabama: Boman v Birmingham Transit Co, USCA 5th Cir, p 841*

## Trial Procedure

### EVIDENCE

*California: People v Sweeney, Cal Dist Ct of Appl, p 845*

### FAIR TRIAL

*New York: People v Devonish, NY Co Sup Ct, p 846*

### JURIES

*Arkansas: Bailey v Henslee, USDC, p 846*

*Illinois: People v Ford, Ill Sup Ct, p 853*

### PROSECUTOR'S SUMMATION

*New Jersey: State v Dunlap, NJ Super Ct, p 854*

## Legislatures

## Education

### PUBLIC SCHOOLS

*Louisiana: Act 333, free textbooks or other supplies to integrated schools, p. 857*

*Act 492, study of state education, p. 857*

*Act 495, governor's authority to close, p. 861*

*Act 496, legislature's right to reclassify, p. 862*

*Act 542, closing in case of disorder, p. 864*

### TRADE AND SPECIAL SCHOOLS

*Louisiana: Act 579, governor's authority to close in case of disorder, p. 865*

*Act 580, maintenance of current Negro and non-Negro classification, p. 866*

*Act 581, free school supplies, p. 867*

*Act 582, governor's authority to close if integration ordered, p. 868*

# TABLE OF CONTENTS

## AGE AND RACE CERTIFICATION

*Louisiana:* Act 541, requirements for children on first entry into public or private schools, p. 869

## Birth Certificates

### DELAYED ISSUANCE

*Louisiana:* Act 410, parties defendant in suits to obtain, p. 870

## Church Property

### TRANSFER OF CONTROL

*Louisiana:* Act 346, transfer to local beneficiaries, p. 871

## Constitutional Amendments

### RECALL OF OFFICIALS

*Louisiana:* Act 630, agency officials ordering integration of tax-supported facility, p. 872

## Criminal Law

### AGGRAVATED BATTERY

*Louisiana:* Act 69, felonious conduct resulting in riot, p. 873

### DISTURBING PEACE

*Louisiana:* Act 70, offense defined, p. 875

### ILLEGITIMATE CHILDREN

*Louisiana:* Act 75, crime to give birth to, p. 876

### OBSTRUCTING PUBLIC PASSAGES

*Louisiana:* Act 80, penalties for, p. 877

## Criminal Law

### PERJURY

*Louisiana:* Act 68, false statements re deprivation of constitutional rights, p. 878

### RESISTING AN OFFICER

*Louisiana:* Act 76, offense defined, p. 879

## Criminal Mischief

### TRESPASS

*Louisiana:* Act 77, offense defined, p. 880

## Elections

### QUALIFICATION OF CANDIDATES

*Louisiana:* Act 538, race required on all forms, p. 880

### QUALIFICATIONS OF ELECTORS

*Louisiana:* Act 613, proposed constitutional amendment; additional criteria for refusing registration, p. 881

### REGISTRARS

*Louisiana:* Act 82, interference with, p. 883  
Act 484, attorney general made official legal adviser, p. 884  
Act 485, faithful compliance with registration laws required, p. 884

### REGISTRATION

*Louisiana:* Act 305, form to be used, p. 885

### VOTING RECORDS

*Georgia:* Act 652, amendment to 1958 voting law, p. 886

## Employment

### NON-DISCRIMINATION

*New York:* Chapter 978, amendment to Fair Employment Practice Act, procedure for subpoenas etc., p. 887

### UNLAWFUL PRACTICES, DISCRIMINATION

*Delaware:* Chapter 337, unlawful practices, p. 889

## Hospitals

### ADMISSION

*Louisiana:* Act 136, fraud by applicants for admission, p. 890

## Litigation

### DEFENSE OF OFFICIALS

*Louisiana:* Act 304, payment of attorneys fees in suits against state officials, p. 891

## Marriage

### 'COMMON LAW' MARRIAGE

*Louisiana:* Act 73, illegality of common law marriage, p. 892



# TABLE OF CONTENTS

## Organizations

### MEMBERSHIP LISTS

*Louisiana:* Act 373, exemption from filing, p. 893

### STATE SOVEREIGNTY COMMISSION

*Louisiana:* Act 18, commission established, p. 893

## Public Accommodations

### BUSSES, STREETCARS

*Louisiana:* Act 543, operators required to enforce seating regulations, p. 896

### DEFINITION

*New York:* Chapter 779, amendment, places subject to provisions of Public Accommod Law, p. 896

## Trespass

### PENALTIES

*Louisiana:* Illegal trespass on certain structures, p. 897

### SOLICITATION

*Louisiana:* Inciting trespass a crime, p. 898

## Welfare Funds

### AID TO DEPENDENT CHILDREN

*Louisiana:* Act 251, eligibility for state aid, p. 899

### ILLEGITIMATE CHILDREN

*Louisiana:* Act 306, public assistance to mothers prohibited, p. 901

## Attorneys General

### Civil Disturbances

#### SIT-IN DEMONSTRATIONS

*Massachusetts:* Interference with sympathy picketing, p. 903

### Employment

#### NON-DISCRIMINATION

*Maryland:* Baltimore city solicitor opinion re assn of municipal employees, p. 903

### Governmental Facilities

#### GOLF COURSES

*California:* Racially restrictive clause in golfers assn memberships, p. 906

## Welfare Funds

### ILLEGITIMATE CHILDREN

*Louisiana:* Scope of Act 306 (aid to mothers of illegitimate children), p. 906

## Administrative Agencies

### Corporations

#### LIBRARIES

*Virginia:* Charter for foundation in Danville, p. 909

### Education

#### PUBLIC SCHOOLS

*New York:* Open enrollment plan, p. 911

### Employment

#### FAIR EMPLOYMENT LAWS

*Michigan:* Jimmerson v Savoy Theater, p. 914  
*Washington:* Matter of Markey, p. 917

#### UNION SEGREGATION PRACTICES

*Tennessee:* Dept of Labor fact sheet on Memphis trusteeship, p. 926

### Housing

#### DISCRIMINATION

*Michigan:* State Corp & Sec Comm ruling on discriminatory real estate practices, p. 927

#### PUBLICLY-ASSISTED HOUSING

*Massachusetts:* Comm Against Discrim ex rel Marshall v Middlesex Homes, p. 928

### State Government

#### "CODE OF FAIR PRACTICES"

*New York:* State policy prohibiting discrimination in areas of governmental activity, p. 932

## Reference Article

"Legal Aspects of the Sit-In Movement", p. 935

### Cumulative Table of Cases, p. 949

# TABLE OF CONTENTS

<p> <b>Introduction</b>          The purpose of this book is to provide a comprehensive overview of the various aspects of the legal system, from the basic principles of law to the complex procedures of litigation. It is designed to be a useful reference for students, practitioners, and anyone interested in the legal field.       </p>	<p> <b>Part I: The Legal System</b>          Chapter 1: The Role of the Law          Chapter 2: The Structure of the Legal System          Chapter 3: The Sources of Law          Chapter 4: The Legal Profession       </p>
<p> <b>Part II: Civil Law</b>          Chapter 5: Torts          Chapter 6: Contracts          Chapter 7: Property          Chapter 8: Family Law          Chapter 9: Wills and Estates       </p>	<p> <b>Part III: Criminal Law</b>          Chapter 10: General Principles of Criminal Law          Chapter 11: Crimes          Chapter 12: Criminal Procedure       </p>
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<p> <b>Part VI: Legal Research and Writing</b>          Chapter 17: Legal Research          Chapter 18: Legal Writing       </p>	<p> <b>Part VII: Miscellaneous</b>          Chapter 19: Legal Ethics          Chapter 20: Legal History       </p>

# UNITED STATES SUPREME COURT

## CONSTITUTIONAL LAW

### Freedom of Speech and Press—California

Manuel D. TALLEY v. STATE of California.

United States Supreme Court, March 7, 1960, 80 S.Ct. 536.

**SUMMARY:** A man distributed in Los Angeles, California, handbills bearing an organizational name and address and urging readers to help the organization boycott named merchants and businessmen because they carried products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals." Readers were also urged therein to complete a membership blank and to subscribe to a statement that "I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth." The man was convicted and fined in a municipal court for violating an ordinance which forbids the distribution of any handbill which does not have printed thereon the name and address of "the person who printed, wrote, compiled or manufactured the same" and of "the person who caused the same to be distributed," provided that if a "fictitious person or club" is named "the true names and addresses of the owners, manufacturers or agents of the person sponsoring" the handbill would also have to appear on it. The Appellate Department of the Superior Court of the County of Los Angeles affirmed. 332 P.2d 447 (1958). On certiorari, the United States Supreme Court, with three justices dissenting, reversed and remanded. The court upheld petitioner's contention that the ordinance is unconstitutional for invading free speech and press guarantees of the Fourteenth and First Amendments. The state's contention that the ordinance is justifiable as a way of identifying those responsible for fraud, false advertising, and libel was rejected because it is not limited to those objects, barring instead all handbills under all circumstances anywhere that do not have the required names and addresses printed on them. The court relied on the holding in *Bates v. City of Little Rock* [361 U.S. 516, 5 Race Rel. L. Rep. 35 (1960)] and *NAACP v. State of Alabama* [357 U.S. 449, 3 Race Rel. L. Rep. 611 (1958)] that there are times and circumstances when states may not compel members of groups disseminating ideas to be identified publicly because such identification and fear of reprisal might deter peaceful discussions of important public matters. Holding the Los Angeles ordinance to be subject to the same infirmity, the court declared it void on its face.

BLACK, Justice

The question presented here is whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills "abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution."<sup>1</sup> The ordinance, §

28.06 of the Municipal Code of the City of Los Angeles, provides:

"No person shall distribute any handbill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

· "(a) The person who printed, wrote, compiled or manufactured the same.

"(b) The person who caused the same

1. *Schneider v. State of New Jersey*, Town of Irvington, 308 U.S. 147, 154, 60 S.Ct. 146, 147, 84 L.Ed. 155. Cf. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949.

to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon."

#### [Arrest and Trial]

The petitioner was arrested and tried in a Los Angeles Municipal Court for violating this ordinance. It was stipulated that the petitioner had distributed handbills in Los Angeles, and two of them were presented in evidence. Each had printed on it the following:

National Consumers Mobilization,  
Box 6533,  
Los Angeles 55, Calif.  
PLEasant 9-1576.

The handbills urged readers to help the organization carry on a boycott against certain merchants and businessmen, whose names were given, on the ground that, as one set of handbills said, they carried products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals." There also appeared a blank, which, if signed, would request enrollment of the signer as a "member of National Consumers Mobilization," and which was preceded by a statement that "I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth."

#### [Conviction and Fine]

The Municipal Court held that the information printed on the handbills did not meet the requirements of the ordinance, found the petitioner guilty as charged, and fined him \$10. The Appellate Department of the Superior Court of the County of Los Angeles affirmed the conviction, rejecting petitioner's contention, timely made in both state courts, that the ordinance invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution.<sup>2</sup> 332 P.2d

<sup>2</sup> Petitioner also argues here that the ordinance both on its face and as construed and applied "arbitrarily denies petitioner equal protection of the laws in violation of the Due Process and Equal Protection" Clauses of the Fourteenth Amendment. This argument is based on the fact that the ordinance applies to handbills only, and does not include within its proscription books, magazines and newspapers. Our disposition of the case makes it unnecessary to consider this contention.

447. Since this was the highest state court available to petitioner, we granted certiorari to it to consider this constitutional contention. 360 U.S. 928, 79 S.Ct. 1457, 3 L.Ed.2d 1543.

In *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been historic weapons in the defense of liberty"<sup>3</sup> and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.*, 303 U.S. at page 452, 58 S.Ct. at page 669. A year later we had before us four ordinances each forbidding distribution of leaflets—one in Irvington, New Jersey, one in Los Angeles, California, one in Milwaukee, Wisconsin, and one in Worcester, Massachusetts. *Schneider v. State of New Jersey*, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155. Efforts were made to distinguish these four ordinances from the one held void in the Griffin case. The chief grounds urged for distinction were that the four ordinances had been passed to prevent either frauds, disorder, or littering, according to the records in these cases, and another ground urged was that two of the ordinances applied only to certain city areas. This Court refused to uphold the four ordinances on those grounds pointing out that there were other ways to accomplish these legitimate aims without abridging freedom of speech and press. Fraud, street littering and disorderly conduct could be denounced and punished as offenses, the Court said. Several years later we followed the Griffin and Schneider cases in striking down a Dallas, Texas, ordinance which was applied to prohibit the dissemination of information by the distribution of handbills. We said that although a city could punish any person for conduct on the streets if he violates a valid law, "one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an

3. The Court's entire sentence was: "These [pamphlets and leaflets] indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." It has been noted that some of Thomas Paine's pamphlets were signed with pseudonyms. See Bleyer, *Main Currents in the History of American Journalism* (1927), 90-93. Illustrations of other anonymous and pseudonymous pamphlets and other writings used to discuss important public questions can be found in this same volume.

orderly fashion \* \* \* by handbills and literature as well as by the spoken word." *Jamison v. State of Texas*, 318 U.S. 413, 416, 63 S.Ct. 669, 672, 87 L.Ed. 869.

#### [*Why the Ordinance Falls*]

The broad ordinance now before us, barring distribution of "any hand-bill in any place under any circumstances,"<sup>4</sup> falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of the persons who prepared, distributed or sponsored them. For, as in *Griffin*, the ordinance here is not limited to handbills whose content is "obscene or offensive to public morals or that advocates unlawful conduct."<sup>5</sup> Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the printed names and addresses on them in the place the ordinance requires.

#### [*Freedom Restricted*]

There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. City of Griffin*, 303 U.S. at page 452, 58 S.Ct. at page 669.

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The

obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udall were sentenced to death on charges that they were responsible for writing, printing or publishing books.<sup>6</sup> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day.<sup>7</sup> Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

#### [*Two Other Decisions*]

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412; *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the *Griffin*, Georgia, ordinance, is void on its face.

#### The judgment of the Appellate Department

4. Section 28.00 of the Los Angeles Municipal Code defines "handbill" as follows: "Handbill" shall mean any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."
5. *Lovell v. City of Griffin*, 303 U.S. at page 451, 58 S.Ct. at page 668.

6. Penry was executed and Udall died as a result of his confinement. 1 Hallam, *The Constitutional History of England* (1855), 205-206, 232.
7. In one of the letters written May 28, 1770, the author asked the following question about the tea tax imposed on this country, a question which he could hardly have asked but for his anonymity: "What is it then, but an odious, unprofitable exertion of a speculative right, and fixing a badge of slavery upon the Americans, without service to their masters?" 2 Letters of Junius (1821) 39.



of the Superior Court of the State of California is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment reversed and cause remanded with directions.

### Concurring Opinion

Mr. Justice HARLAN, concurring.

In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts said in *Schneider v. State of New Jersey*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155, "the delicate and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling. See *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 463, 464, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488; *Sweezy v. State of New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion); see also *Bates v. City of Little Rock*, 361 U.S.—, 80 S.Ct. 412.

#### [*Alleged Limitations Not Actual*]

Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, [7a] such a generality is for me too

[7a] On the oral argument the City Attorney stated:

"We were able to find out that prior to 1931 an effort was made by the local Chamber of Commerce, urging the City Council to do something about these handbills and advertising matters which were false and misleading—had no names of sponsors. They were particularly interested in the

remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have.

On these grounds I concur in the judgment of the Court.

### Dissent

Mr. Justice CLARK, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

To me, Los Angeles' ordinance cannot be read as being void on its face. Certainly a fair reading of it does not permit a conclusion that it prohibits the distribution of handbills "of any kind at any time, at any place, and in any manner," *Lovell v. City of Griffin*, 1938, 303 U.S. 444, 451, 58 S.Ct. 666, 669, 82 L.Ed. 949, as the Court seems to conclude. In *Griffin*, the ordinance completely prohibited the unlicensed distribution of any handbills. As I read it, the ordinance here merely prohibits the distribution of a handbill which does not carry the identification of the name of the person who "printed, wrote, compiled \* \* \* manufactured [or] \* \* \* caused" the distribution of it. There could well be a compelling reason for such a requirement. The Court implies as much when it observes that Los Angeles has not "referred to any legislative history indicating" that the ordinance was adopted for the purpose of preventing "fraud, false advertising and libel." But even as to its legislative background there is pertinent material which the Court overlooks. At oral argument, the City's chief law enforcement officer stated that the ordinance was originally suggested in 1931 by the Los Angeles Chamber of Commerce in a complaint to the City Council urging it to "do something about these handbills and advertising matters which were false and misleading."

fictitious name. They said, 'Who are these people that are distributing; who are advertising; doing things of that sort?' The meager record that we were able to find indicates that a request from the Council to the City Attorney as to their legal opinion on this subject [sic]. The City Attorney wrote back and formed the conclusion that distribution of handbills, pamphlets, or other matters, without the name of the fictitious firm or officers would be legal [sic]. Thereafter in the early part of 1932 an ordinance was drafted, and submitted to the City Council, and approved by them, which related to the original subject—unlawful for any person, firm or association to distribute in the city of Los Angeles any advertisement or handbill—or any other matter which does not have the names of the sponsors of such literature."



Upon inquiry by the Council, he said, the matter was referred to his office, and the Council was advised that such an ordinance as the present one would be valid. He further stated that this ordinance, relating to the original inquiry of the Chamber of Commerce, was thereafter drafted and submitted to the Council. It was adopted in 1932. In the face of this and the presumption of validity that the ordinance enjoys, the Court nevertheless strikes it down, stating that it "falls precisely under the ban of our prior cases." This cannot follow, for in each of the three cases cited, the ordinances either "forbade any distribution of literature \* \* \* without a license," *Lovell v. City of Griffin*, supra, or forbade, without exception, any distribution of handbills on the streets, *Jamison v. State of Texas*, 1943, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; or, as in *Schneider v. State of New Jersey*, 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, which covered different ordinances in four cities, they were either outright bans or prior restraints upon the distribution of handbills. I, therefore, cannot see how the Court can conclude that the Los Angeles ordinance here "falls precisely" under any of these cases. On the contrary to my mind they neither control this case nor are apposite to it. In fact, in *Schneider*, depended upon by the Court, it was held, through Mr. Justice Roberts, that, "In every case \* \* \* where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation \* \* \* weigh the circumstances and \* \* \* appraise the substantiality of the reasons advanced \* \* \*." *Id.*, 308 U.S. at page 161, 60 S.Ct. at page 151. The Court here, however, makes no appraisal of the circumstances, or the substantiality of the claims of the litigants, but strikes down the ordinance as being "void on its face." I cannot be a party to using such a device as an escape from the requirements of our cases, the latest of which was handed down only last month. *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412.<sup>1</sup>

[Public Interest Should Be Weighed]

Therefore, before passing upon the validity of

1. "When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." 361 U.S. at page —, 80 S.Ct. at page 417.

the ordinance, I would weigh the interests of the public in its enforcement against the claimed right of Talley. The record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name. Unlike *N. A. A. C. P. v. State of Alabama*, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer "economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility." *Id.*, 357 U.S. at page 462, 78 S.Ct. at page 1172. Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance down.

But even if the State had this burden, which it does not, the substantiality of Los Angeles' interest in the enforcement of the ordinance sustains its validity. Its chief law enforcement officer says that the enforcement of the ordinance prevents "fraud, deceit, false advertising, negligent use of words, obscenity and libel," and, as we have said, that such was its purpose. In the absence of any showing to the contrary by Talley, this appears to me entirely sufficient.

[No Freedom of Anonymity]

I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech. In fact, this Court has approved laws requiring no more than Los Angeles' ordinance. I submit that they control this case and require our approval of Los Angeles' ordinance under the attack made here. First, *Lewis Publishing Co. v. Morgan*, 1913, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner, and stockholders. 39 U.S.C. § 233, 39 U.S.C.A. § 233. Second, in the Federal Regulation of Lobbying Act, 2 U.S.C. § 267, 2 U.S.C.A. § 267, Congress requires those engaged in lobbying to divulge their identities and give "a modicum of information" to Congress. *United States v. Har-riss*, 1954, 347 U.S. 612, 74 S.Ct. 808, 816, 98 L.Ed. 989. Third, the several States have corrupt practices acts outlawing, *inter alia*, the distribution of anonymous publications with

reference to political candidates.<sup>2</sup> While these statutes are leveled at political campaign and election practices, the underlying ground sustaining their validity applies with equal force here.

No civil right has a greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights. In this area the danger of coercion and reprisals—economic and otherwise—is a matter of common knowledge. Yet these statutes, disallowing anonymity in promoting one's views in election campaigns, have expressed the overwhelming public policy of the Nation. Nevertheless the Court is silent about this impressive authority relevant to the disposition of this case.

All three of the types of statutes mentioned are designed to prevent the same abuses—libel, slander, false accusations, etc. The fact that some of these statutes are aimed at elections, lobbying, and the mails makes their restraint no more palatable, nor the abuses they prevent less deleterious to the public interest, than the present ordinance.

#### [What Los Angeles Requires]

All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the platform. The ordinance makes for the responsibility in writing that is present in public utterance. When and if the application of such an ordinance in a given case encroaches on First Amendment freedoms, then will be soon enough to strike that application down. But no such restraint has been shown here. After all, the public has some rights against which the enforcement of freedom of speech would be "harsh

2. Thirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections. E. g.: Kan.G. S.1949, § 25-1714; M.S.A. § 211.08; Page's Ohio R.C. § 3599.09; Purdon's Pa.Stat.Ann., Title 25, § 3546.

and arbitrary in itself." Kovacs v. Cooper, 1949, 338 U.S. 77, 88, 69 S.Ct. 448, 454, 93 L.Ed. 513. We have upheld complete proscription of uninvited door-to-door canvassing as an invasion of privacy. Breard v. City of Alexandria, 1951, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. Is this less restrictive than complete freedom of distribution—regardless of content—of a signed handbill? And commercial handbills may be declared *verboden*, Valentine v. Chrestensen, 1942, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, regardless of content or identification. Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door, and attacking its then lawful commercial practices, more comfortable with First Amendment freedoms? I think not. Before we may expect international responsibility among nations, might not it be well to require individual responsibility at home? Los Angeles' ordinance does no more.

#### [Equal Protection Not Deprived]

Contrary to petitioner's contention, the ordinance as applied does not arbitrarily deprive him of equal protection of the law. He complains that handbills are singled out, while other printed media—books, magazines, and newspapers—remain unrestrained. However, "[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. \* \* \* Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. \* \* \* The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. [I] cannot say that that point has been reached here." Williamson v. Lee Optical, 1955, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. I dissent.

## MISCELLANEOUS ORDERS

## The United States Supreme Court:

## Denied Application for Stay of Judgment:

*Ennis v. Evans* (Prior decision 281 F.2d 385, 5 Race Rel. L. Rep. 637, *infra* [3rd Cir. 1960]). September 1, 1960, 81 S.Ct. 27, order: "The application for a stay of the execution and enforcement of the judgments of the United States Court of Appeals for the Third Circuit presented to Mr. Justice BRENNAN, and by him referred to the Court, is denied."

*Houston Independent School District v. Ross*, (Prior decision \_\_\_\_\_ F.Supp. \_\_\_\_\_, 5 Race Rel. L. Rep. 703, *infra* [S.D. Texas 1960]). September 1, 1960, 81 S.Ct. 27, order: "The application for a stay of the judgment of the United States District Court for the Southern District of Texas, presented to Mr. Justice BLACK, and by him referred to the Court, is denied."

*Orleans Parish School Board v. Bush; Davis v. Williams* (Prior decision 187 F.Supp. 42, 5 Race Rel. L. Rep. 655, *infra* [E.D. La. 1960]). September 1, 1960, 81 S.Ct. 28, order: "The application for a stay of the temporary injunction of the United States District Court for the Eastern District of Louisiana is denied."

## Denied Motion to Vacate Order:

*Bush v. Orleans Parish School Board* (Prior decision 187 F.Supp. 42, 5 Race Rel. L. Rep. 655, *infra* [E.D. La. 1960]). September 1, 1960, 81 S.Ct. 28, order: "The motion to vacate the order of the United States District Court for the Eastern District of Louisiana of August 31, 1960, is denied."

## Docketed Cases:

*Anderson v. Alabama* (Prior decision 120 So.2d 397, 5 Race Rel. L. Rep. 490 [Ala. Court of Appeals, 1959] affirming the conviction of a Negro upon determining that he had failed to carry his burden of proving that the jury commissioners of the county wherein he was indicted and tried have a scheme for excluding Negroes from the rolls, and accordingly rejecting his contention that at the times of his indictment and trial there was systematic exclusion of Negroes from the county grand and petit juries in denial of his constitutional right to equal protection of the laws). No. 326, August 16, 1960, 29 L.W. 3055.

*Louisiana v. National Association for the Advancement of Colored People* (Prior decision 181 F.Supp. 37, 5 Race Rel. L. Rep. 467 [E.D. La. 1960]) holding unconstitutional Louisiana statutes requiring each of several kinds of organizations to file annually, under pain of criminal penalties, a list of names and addresses of members residing in the state, and requiring non-trading organizations engaged in social, educational, or political activities, which are affiliated with organizations created or operating under laws of other states, to file an affidavit attesting that none of the affiliates' officers is a member of any organization cited by the Congressional House un-American Activities Committee or the United States Attorney General as Communist, Communist-front, or subversive). No. 294, August 4, 1960, 29 L.W. 3055.



# COURTS

## EDUCATION Public Schools—Arkansas

John AARON, et al. v. Everett TUCKER, Jr., et al.

United States District Court, Eastern District, Arkansas, Western Division, September 2, 1960, 186 F.Supp. 913.

**SUMMARY:** This decision is a further development in the Little Rock school case. For earlier litigation see 1 Race Rel. L. Rep. 851 (1956), 2 Race Rel. L. Rep. 593, 931-65 (1957), 3 Race Rel. L. Rep. 618, 621, 851-891, 1052 (1958), 4 Race Rel. L. Rep. 17, 543 (1959). In August, 1959, two Negro plaintiffs filed a motion for further relief, alleging: that they were students who had attended Little Rock Central High School during the 1957-1958 school year when troops occupied the schools; that they had registered again to attend the school; but that they had been notified they were to attend the segregated Horace Mann High School. The school board replied that the schools were now being administered under assignment criteria described in the pleadings, that the plaintiffs had been assigned to Horace Mann school, that their applications for reassignment were being processed under regular procedures, and that the schools were being operated in a non-discriminatory manner. Later, this answer was amended to state that plaintiffs had not applied for reassignment and hence had no grievance. The board's plan provides for initial assignment by the superintendent on the basis of the specified criteria which include: availability of room, teaching capacity, and transportation; effect of the admission of new pupils upon established programs; suitability of established curricula for particular pupils; adequacy of the pupil's preparation for admission; scholastic aptitude; psychological qualifications of the pupil for the type of teaching and associations involved; the possibility of breaches of the peace; morals, conduct, health and personal standards of the pupil; and the request or consent of parents. After the superintendent's assignments have been made, the parents of the child have ten days to appeal, and within 30 days the board is required to begin a hearing, at which both the child and his parent must be present. A separate hearing is required for each child. Upon disagreement with the result of the hearing, the parent is allowed 15 days for filing an exception. Although 51 Negro students had registered at three "white" high schools in Little Rock, the board assigned only three each to Central and Hall High Schools. One of the two plaintiffs in this action, in the assigning officials' opinion, had failed to make the adjustment to the desegregated school, while the other was assigned to the one-floor Negro high school rather than the multi-story white school because of a health impairment. In the present case it was held that none of the plaintiffs had any absolute right to be assigned to any particular school because of residence proximity or any other single consideration. The court found the school board to be following a transitional program with "all deliberate speed," and expressed the belief that "as time passes and transition progresses, application of the same standards and criteria will progressively produce entirely different results as to the ability of particular students to make the change without unwarranted injury to themselves, other students and the school system." The motion of the plaintiffs and the motion of 14 other Negroes to intervene were



denied. [The footnotes to the opinion (including the Little Rock School District plan) are printed at the end of the opinion].

MILLER, District Judge.

This is another of the many controversies that have stemmed from the judgment of this court approving a plan for desegregation of the Little Rock, Arkansas, public schools on August 27, 1956. *Aaron, et al., v. Cooper, et al.*, 143 F.Supp. 855 (D.C.E.D. Ark.).<sup>1</sup>

On August 8, 1959, the plaintiffs, for themselves and all other members of the class whom they claim to represent, filed their motion for further relief in which it was alleged that Thelma Mothershed and Melba Pattillo are two of the nine negro students who were admitted to and attended Central High School in Little Rock during the 1957-58 school term; that in July 1959 they registered at Central High School with other students who lived in the Central High School attendance zone; that on or about August 3, 1959, they were notified that they would not be admitted to Central High School during the 1959-60 school term, and that they would be assigned to attend the Horace Mann High School, which is a racially segregated school maintained by defendants for negro pupils.

On August 21, 1959, the defendants filed a response to the motion of plaintiffs for further relief, in which they alleged:

"(1) Immediately after the decision of the Three Judge Court in this action holding Act 4 of the Second Extraordinary Session of the General Assembly for the year 1958 unconstitutional and void, the defendants, in accordance with and as commanded by existing court orders, assumed full control and operation of all the public schools of the District. As specified by the applicable Pupil Assignment Laws of the State of Arkansas, the Board of Directors adopted Assignment Regulations, a copy of which is attached hereto and made a part hereof,<sup>2</sup> and undertook the assignment procedure set forth therein and in the applicable laws, all within the framework of existing court orders. All students have been given their initial assignments, the high schools are open and are being operated on a non-discriminatory basis, and the Board of Directors is now engaged in processing all applications for reassignments. These applications are

being and will be processed expeditiously and action taken thereon in good faith and on a non-discriminatory basis. The administrative procedure has not been completed.

"(2) Thelma Mothershed and Melba Pattillo were initially assigned to Horace Mann High School and each has filed application for reassignment to Central High School. These applications are pending, and if and as long as each pursues her administrative remedies in compliance with the regulations of the Board, the Board will process the applications in good faith and in a non-discriminatory manner. The same procedure will be followed as to any student who so acts. In particular, these plaintiffs have not exhausted their administrative remedies.

"(3) The assignment and reassignment of each student is necessarily handled and to be handled on an individual basis and the class proceeding attempted by plaintiffs in this motion is improper. A court proceeding could be proper only after all administrative remedies are exhausted and only on an individual basis.

"(4) Since the public schools, under applicable law and court orders, are to be, and must be, operated by the School Boards, and not by the courts, no student can acquire a vested right to attend any particular school any more than he or she can acquire a vested right to receive, regardless of ability, progress and attitude, a particular grade. The circumstances, facts and factors governing assignments, of which residence proximity is only one of many, and education, many of which change from time to time, necessarily require flexibility and an area of conscientious discretion on the part of the Board. Only in this way can the best interests of the educational system, the public and the children be served. Thus, none of the plaintiffs, or any other student, has been granted by court order or has acquired any vested right to attend any particular school.

"(5) The existing court orders have only called for desegregation, or actually non-discriminatory operation, of the schools at the high school level at this time and the



acts of the defendants, and the procedures followed and being followed by them, have clearly been within the framework of the governing court orders and decisions.

"(6) All allegations of the motion for further relief are denied except those expressly admitted above and those that require no comment because they pertain to court orders and decisions that speak for themselves."

[*Amendment to Response*]

On the same date, August 21, 1959, the defendants filed an amendment to the response, in which they alleged:

"In paragraph II (2) of their response, the defendants stated that Thelma Mothershed and Melba Pattillo had filed applications for reassignment. To date 65 white and Negro students have filed applications for reassignment, but a re-check of the records of the District reveals that neither Thelma Mothershed nor Melba Pattillo has filed an application. Therefore, they have refused to comply with the regulations of the Board and have not exhausted or made any attempt to exhaust their administrative remedies. By reason thereof, they are barred from pursuing any judicial remedies they might otherwise have had, and this motion must be dismissed. With reference to those students who have filed applications for reassignment and all other students who pursue their administrative remedies in compliance with the regulations of the Board and applicable assignment laws, the Board is proceeding and will proceed to hear and process the applications expeditiously, in good faith and in a non-discriminatory manner. Hearings on applications for reassignment are being scheduled with the first hearings already set for August 28, 1959."

On September 19, 1959, fourteen Negro students filed their motion to be allowed to intervene, which motion was granted September 23, 1959. In the intervention, it was alleged:

"1. The minor applicants for intervention herein are some of the 'other Negro students who are members of the class represented by the named plaintiffs in this cause' referred to in paragraph 1b of the Plaintiffs' Motion for Further Relief which was filed in this court on August 8, 1959.

"2. Applicants for intervention are among those generally classified as Negroes, are citizens of the United States and of the State of Arkansas, and are residents of and domiciled in the City of Little Rock, Arkansas. The minor applicants for intervention are within the statutory age limits of eligibility to attend the public schools of said City and possess all qualifications and satisfy all requirements for admission thereto. The adult applicants for intervention are the parents, or persons standing in *loco parentis*, of the minor applicants for intervention, and are taxpayers of the United States and of said State and City.

"3. Applicants for intervention should be permitted to intervene as parties-plaintiff in this action upon the following grounds:

- "a. They are members of the class on behalf of which the original action is brought;
- "b. They have substantial interest in the subject matter of the action;
- "c. They are and will be bound by and benefit from any judgment, decree, or order entered or to be entered in this action;
- "d. Their complaint and the original action have questions of law and fact in common;
- "e. Their intervention will not to any extent delay or prejudice the further adjudication of the rights of the original parties."

This cause proceeded to trial to the court on March 22-23, 1960. The response of the defendants to the original motion for further review was treated as a response to the intervention heretofore set forth.<sup>3</sup>

In the consideration of the contentions of the parties certain undisputed background facts should be borne in mind.

[*Status of Board*]

The Board of Directors in charge of the schools on August 27, 1956, when the plan for operating the schools on a nondiscriminatory basis was approved, Aaron, et al., v. Cooper, et al., 143 F.Supp. 855, resigned, and in December 1958 the present members, Messrs. Tucker, Matson, and Lamb, were elected along with Messrs. Ed I. McKinley, Jr., Ben D. Rowland and R. W. Laster. At that time the high

schools were closed and had been since September 12, 1958, by proclamation of the Governor issued under Act 4 of the Second Extraordinary Session of the General Assembly of Arkansas. There was also an entirely new administrative staff and an entirely new group of attorneys representing the School District. Mr. Terrell E. Powell had replaced Mr. Virgil Blossom as Superintendent, and Mr. Paul Fair had become the new Assistant Superintendent. The new Board elected in December 1958 qualified, and the first event in sequence of time was a hearing before this court on January 6, 1959, 169 F.Supp. 325, for the purpose of determining and fixing the provisions and terms of the decree of the court in accordance with the mandate of the United States Court of Appeals for the Eighth Circuit, issued December 2, 1958, and filed herein December 4, 1958, 261 F.2d 97. The new Board was confronted with the duty of familiarizing itself with all the proceedings that had occurred prior to its election. On January 9, after the hearing on January 6, the court entered the order hereinbefore referred to, giving the defendants 30 days in which to file its report. The report was filed, but at that time the high schools were still closed by the action taken by the Governor of the State of Arkansas, under Act 4 of the General Assembly of the State of Arkansas. In its report the defendants asked permission to open the schools on a segregated basis, pending additional study and a further report. The plaintiffs strenuously objected to the opening of any of the high schools on a segregated basis, and the court refused to permit the schools to be opened on a segregated basis. (See footnote 1.) However, the defendants were unable to proceed because of the closing order heretofore referred to.

#### [Careful Consideration]

The Board gave careful and full consideration to ways and means of coping with the situation with which it was confronted. The Board held many meetings and discussions in an effort to find some way in which to proceed under the law and to operate a nondiscriminatory system of schools. The members of the Board were not in full agreement, and primarily because of action taken by the Board on May 5, 1959, petitions were circulated and a recall election was ordered. At the recall election Messrs. Tucker, Matson and Lamb were retained, but Messrs. McKinley, Rowland and Laster were recalled.

Thereafter in June 1959, Messrs. Cottrell and Mackey were appointed to the Board, and in July 1959 Mr. McDonald was appointed to the Board. In the meantime, the three-judge court was considering the constitutionality of the school closing act, and on June 18, 1959, entered its decree, holding the closing acts unconstitutional. (Footnote 1, and Aaron, et al., v. McKinley, et al., 173 F. Supp. 944.) From the date that decree was entered, June 18, 1959, the newly constituted Board, consisting of the present defendants, met almost continuously at a tremendous personal sacrifice in a dedicated effort to open the schools in the manner provided and required by law.

Because the high schools were closed during the 1958-59 school year, the thousands of students had been admitted to other schools, and for that reason it was necessary for the Board to require a registration of all students at the high school level. Registration was set for July 21 through July 24, 1959, and there were some 2,600 pupils registered. It was necessary for the Board to know approximately how many pupils would attend the high schools. It knew that there were cross registrations between the public high schools and various private high schools in many instances. Therefore, the Board requested that each student state his or her preference in the request for original assignment. Also, a question was asked whether the student intended to attend the school to which he was assigned.

#### [Six Register at Hall]

During the registration period six Negro students, including the plaintiffs William Norwood and Reuben Robinson, registered at Hall High School. Three Negro students, including the plaintiff Lee Andrew Hill, registered at Technical High School, and 50 Negro students, including the plaintiffs William Massie, Jr., Merriam Lupper, Ilona Weaver, Margaretta Motley, John Gray, Jane Hill, William Crout, Fred C. Craig, Phillip B. Ingram, Joyce Miller, and Edna Marie Shockley, registered at Central.

The registration was completed on July 24, 1959, and it is important to keep in mind that the high schools were scheduled to be opened on August 10. The opening date was set in order to give the high school students an orientation period prior to the regular opening of schools in September. It was necessary for the Board to make initial assignments as soon as

possible so that any protesting white or Negro child could bring to the attention of the Board his or her objection to the assignment and to request reassignment in ample time to have the question determined prior to the beginning of regular school work in September. The Board had the tremendous task of assigning between 2,500 and 3,000 high school students, and, after obtaining all the information possible from school records, it proceeded to make the initial assignments on July 29. The defendants and all the school personnel worked constantly on the multitude of details. It was thought to be necessary to set up an elaborate identification system as part of the procedure designed to insure order and the proper operation of the schools without undue interference by unauthorized persons. School supplies had to be obtained and plans for employment of guards were formulated. Teachers had to be obtained.

#### [*Enormity of Task*]

In retrospect it is difficult for a person not intimately acquainted with the facts and conditions existing in July 1959 to appreciate that the normal and simple objective of opening and operating high schools seemed an almost insurmountable task, but those of us who know the facts and are familiar with prior events realize the enormity of the task that was confronting the defendants.

Prior to the making of the initial assignments, the Board adopted the regulations heretofore set forth in footnote 2.

At the time of the making of the initial assignments, the Board recognized that as a practical matter the degree of completeness of consideration could not be given the making of the initial assignments that might be given in the case of an application for reassignment.

Under the tremendous stress and pressure existing in July 1959, the defendants exercised a high degree of good faith and patience in the consideration of the many problems that were confronting them.

On that date, July 29, 1959, the Board assigned three Negro children to Central High School and three Negro children to Hall High School. There had been no Negro students in Hall High School prior to that time. No previous Board had apparently considered assigning any Negro students to the Hall High School.

The two movants in the motion for further relief, Thelma Mothershed and Melba J. Pat-

tillo, were assigned to the Horace Mann High School pursuant to reports of school officials presented to and analyzed by the Board. In the case of Melba J. Pattillo it was determined that she had been unable to make the necessary adjustment and that it was to her educational advantage to attend Mann rather than Central. The investigation revealed that Thelma Mothershed had an impairment in her health which made it to her best interest to attend a one-story school building such as Mann, rather than a multiple-storied building such as Central. The remaining 51 Negro students who had registered at Hall, Central and Technical were assigned to Mann rather than to the schools at which they had registered.

#### [*Deviation from Plan*]

The plaintiffs strenuously contend that the action of the defendant Directors in making the initial assignments is a deviation from the court-approved plan. It is unnecessary to here set forth the original plan. It appears on pages 859-60 of 143 F.Supp., and was approved in *Aaron, et al., v. Cooper, et al.*, 143 F.Supp. 855 (D.C.E.D. Ark., Aug. 22, 1956), which decision was affirmed in *Aaron, et al., v. Cooper, et al.*, 243 F.2d 361 (8 Cir., April 26, 1957).

Suffice it to say, integration was to be accomplished by the undertaking of the first phase at the high school level; following successful integration at the high school level, the second phase was to be started at the junior high school level; and following successful integration of the junior and senior high schools, the third phase was to be started at the elementary school level. At the time the plan was adopted and promulgated it was anticipated that the first phase would start in the fall of 1957; the second phase two or three years thereafter in 1959 or 1960; and the final phase two or three years after the start of the second phase, with the entire plan to be in force by approximately 1963. One provision of the plan was to permit any child who was assigned to a school wherein his race was in the minority to transfer to a school wherein his race was in a majority. It is clear that there was a re-districting in that attendance areas were fixed. It is equally clear that student assignment (at that time called "screening") was provided for and permitted by the plan. In fact, at that time there were approximately as many Negro students eligible for assignment solely on the basis of attendance

areas to formerly all white schools in 1957 as there are now. The screening then employed under the plan reduced the number to 17, and only 9 attended predominantly white schools.

In discussing the original plan, the United States Court of Appeals for the Eighth Circuit at page 364 of 243 F.2d said:

"The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such 'varied' school problems that the Supreme Court in the second *Brown* decision remanded the cases there involved by the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation."

In *Aaron, et al., v. Cooper, et al.*, 257 F.2d 33 (8 Cir., August 18, 1958), the court said at page 35:

"On May 20, 1954, following the decision of the Supreme Court in *Brown v. Board of Education* on May 17, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Board adopted a statement concerning the *Brown* decisions, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955—several days prior to the supplemental opinion of the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Board approved a 'Plan of School Integration,' which provided for a gradual integration of all public schools, beginning with the high school level, in the fall of 1957. See *Aaron v. Cooper, D.C.*, 143 F. Supp. 855 for the plan in its entirety, affirmed 8 Cir., 243 F.2d 361."

The court clearly recognized that "screening" or pupil assignment procedures were contemplated under the plan. It said at page 34 of 257 F.2d:

"In conformity with the plan, and under the direction of the Superintendent of Schools of the Little Rock School District (hereinafter called 'District'), approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened."

It was not contemplated that the residential area of a student would of itself determine the school to be attended by the student. The screening procedures first employed by the Board when the plan was approved did not embody the guiding protective provisions now afforded by the present Arkansas Pupil Assignment Law and the School Board Regulations. At that time there were no prescribed procedures for an application for a hearing. The present procedure embodies all of the basic fairness of due process, whereas the former screening procedure did not. The only practical remedy that a dissatisfied student had then was to go to court, but now he or she can apply for reassignment and in a proper case the reassignment will be granted.

#### [No Absolute Right]

None of the plaintiffs nor any other individual student has an absolute right to be assigned to any particular school in the District because of the provisions of the plan or because of residence proximity or any other single consideration, much less because of living within a particular attendance area that was set by a previous Board four years ago, and prior to the enactment of Act 461, the Arkansas Pupil Assignment Law, March 30, 1959.

In the case of *Earnestine Dove, et al., v. Lee Parham, et al.*, — F.2d—(8 Cir., Aug. 30, 1960), the court, in discussing its opinion in the prior case of *Parham v. Dove*, 271 F.2d 132 (8 Cir. 1959), said:

"We held, however, that in view of the enactment of a state pupil placement or assignment statute, Act No. 461 of 1959, Ark. Stats. Sec. 80-1525 et seq., the District would not be summarily required to make admission of the three individual plaintiffs involved to the school they sought to attend, but should be afforded the opportunity to



make use of the provisions of the statute as a means or an aid in effecting an orderly location of pupils generally, in relation to the various factors which could be involved as to distribution in its school system, except those of purely racial consideration. 271 F.2d at p. 137.

"The recognition of facial validity which we thus gave to the statute was on the basis of it constituting a 'legislative non-racial scheme', intended to serve in effecting student location through 'overall pattern', instead of by promiscuous result. Id. at p. 138. But we cautioned that 'the statute cannot \* \* \* be made to serve, through artificial application, as an instrument for maintaining \* \* \* a system of racial segregation'. Id. at p. 136."

\* \* \*

"That was the basis on which we held in our previous opinion, 271 F.2d at p. 137, that the District was entitled to a use of the placement or assignment statute in relation to its desegregation task, when we stated that the statute was being accorded recognition 'only as an implement or adjunctive element for effecting an orderly solution of (the District's) desegregation difficulties, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the Brown cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result.'"

The plaintiffs further attack the action of the defendants in failing to grant applications for reassignment, and claim that the application of the assignment procedures violated the constitutional rights of the plaintiffs and other Negro children.

#### [19 Ask Reassignment]

Within the ten-day period prescribed by the Board's regulation, 19 Negro students filed applications for reassignments. Likewise 57 white students filed similar applications. Three of the Negro students were assigned to Central. One of the Negro students did not appear at the hearing, and one withdrew his application before the hearing. In addition to Thelma Mothershed and Melba J. Pattillo, neither of whom filed an

application for reassignment, parties to the original motion for further relief, 14 Negro students filed the intervention heretofore set forth. Four of the 14 did not complete the administrative procedure. None of the Negro students who applied for reassignment proceeded in the Circuit Court as prescribed by the Arkansas Pupil Assignment Law. Thirty-two of the 57 white students completed the reassignment procedure, and the Board held 49 hearings as required by the regulation and the Arkansas Pupil Assignment Law (Act 461, Acts of General Assembly of Arkansas for the year 1959).

The court is of the opinion that when the plaintiffs completed the administrative procedures before the Board and the Board had rendered its decision on the applications for reassignment, they were not required to appeal from such decision to the State Circuit Court for the reason that the appeal to the State Circuit Court is a judicial procedure and not an administrative procedure. The filing of the petition for appeal would be tantamount to the institution of a lawsuit in the state court, and the plaintiffs were not required to resort to the state courts for the protection of rights guaranteed by the Constitution of the United States. *Earnestine Dove, et al., v. Lee Parham, et al.*, — F.2d — (8 Cir., Aug. 30, 1960).

Section 9 of the Pupil Assignment Law provides adequate administrative remedies before the Board for the protection of such rights, and such remedies must be pursued individually before a student may invoke the jurisdiction of a federal court.

In *Parham v. Dove*, 271 F.2d 132 (8 Cir. 1959), in discussing the Pupil Assignment Law, the court, beginning at page 139, said:

"The statute makes of the Board the equivalent of an administrative tribunal, with the power and duty of engaging in adjudicatory function, including the consideration of the possibility of constitutional violation in relation to its result. No more than in the case of any other administrative agency, or of a court, does it seem to us that there can properly be recognized an anticipatory right to brand such a proceeding before the Board, in its official responsibility for administration of the statute, as being legally futile and so unnecessary. Even the important problem of school desegregation cannot soundly permit of such

a departure from established legal concept and fundamental principle.

"It is for this reason that we think there is controlling here, and that we adopt, what was said in *Carson v. Board of Education*, 4 Cir., 227 F.2d 789, 790: 'Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary'.

"In a subsequent case, *Carson v. Warlick*, 4 Cir., 238 F.2d 724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664, the court, in an opinion by the late Chief Judge John J. Parker, made reiteration of this judicial limitation, holding 'that the plaintiffs there were not entitled to seek judicial relief, 'for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies have been exhausted'. At page 727 of 238 F.2d. See also *Holt v. Raleigh City Board of Education*, 4 Cir., 265 F.2d 95, 98."

Therefore, those plaintiffs who failed to exhaust the required administrative procedures before the Board have no standing in court to question the action of the Board.

This brings the court to a consideration of whether the constitutional rights of those plaintiffs, including intervenors, who have exhausted their administrative remedies, have been violated by the action of the Board on their applications for reassignment.

#### [Record of Hearings]

The defendants introduced the record of the 49 separate hearings as Exhibits 27-76, both inclusive. Examination of these exhibits, together with Exhibit 6 introduced by the defendants, was limited at the request of the parties to access only by the parties, their attorneys, and the court. It would unduly extend this opinion to review all these *in camera* exhibits. The court has examined and read all of them. They disclose a complete and unbiased consideration of all facts pertaining to the applications for reas-

signment. The reasons assigned by the Board for the action taken in each case, as disclosed by Exhibit 6, are fully justified by the facts.

The court does not feel at liberty to reveal the identity of any of the applicants in the discussion of the contents of his application or the conclusion reached by the Board, but is setting forth in substance a typical record of the application and conclusion of two of the students, selected at random, in footnote 4.

In the first Brown decision, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Supreme Court condemned compulsory segregation in public schools as violating rights of Negro school children guaranteed by the equal protection clause of the Fourteenth Amendment, but the Court kept the cases on the docket and requested further argument on questions 4 and 5, previously propounded by the Court for reargument, before entering an implementing decree. Question 4, which appears in footnote 13 at page 495 of 347 U.S., reads as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

#### [Lines of Argument]

Three lines of argument were made to the court on the question of relief. On one side the plaintiffs argued that there was no justification, legal or factual, for any delay in enforcing their constitutional rights, and that the court should require desegregation "forthwith." On the other side, it was pointed out that racial segregation had been in existence in more than one-third of the states and in the District of Columbia for at least a century; that during that time it had the sanction of decisions of the Supreme Court and was believed by many to be necessary in order to preserve amicable relations between the races; and that school segregation was part of a major social pattern of racial relationships which reflect the mores and folkways prevalent



in large areas. The defendants contended, therefore, that the court should not go beyond its declaration of the constitutional principle, and should leave implementation to the voluntary conduct of the communities and individuals without imposing any limitations as to time. Others, including the United States of America, proposed a middle course by suggesting that the cases be remanded to the lower courts with directions to require defendant school boards to either admit plaintiffs forthwith to nonsegregated schools or to propose, for the lower courts' consideration, an effective plan for accomplishing desegregation as soon as practicable.

The court, after hearing these arguments, held, beginning at page 300 of 349 U. S.:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. . . .

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a sys-

tem of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."

Subsequently in *Cooper v. Aaron*, 358 U.S. 1, 80 S.Ct. 525, 4 L.Ed.2d 532, the court at page 7 of 358 U.S. said:

"Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' Ibid. Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation."

The defendants followed the law as declared by the United States Court of Appeals for the Eighth Circuit where that court, speaking through Chief Judge Harvey M. Johnsen, in *Parham v. Dove*, supra, beginning with the last paragraph on page 136 of 271 F.2d, said:

"Thus, so far as the face of the statute is concerned, there is no basis to say, in legal construction, that the Act is designed, or that it can only operate, to maintain segregation and to prevent integration in a school system. On the other hand, as emphasized in the *Shuttlesworth* case, 162 F.Supp. at page 384, the statute cannot, because of its facial constitutionality, be

made to serve through artificial application, as an instrument for maintaining or effecting a system of racial segregation. It cannot be given an application designed to escape or by-pass the Brown cases. Recognition of and obedience to the holdings of the Brown cases must implicitly exist in its operation and application.

"Accordingly, any scrutiny which the federal courts may be called upon to make of what has been done under such a statute, where a charge of racial discrimination is involved, must necessarily be within the focus and tests of its lack of disharmony with the objective, the obligation and the responsibility dictated by the Brown cases. Insofar as the question of desegregation is concerned, a placement or assignment statute, such as the Arkansas Act, is entitled to have play, on the basis of state sovereignty, as a means or an aid for effecting a sound and orderly distribution of pupils, in relation to all the problems of a public school system, except those of purely racial consideration. Differences in the practical problems of eliminating racial segregation under the varying situations of states or local districts must look for their margins of latitude in effecting that result to the principles laid down in *Brown v. Board of Education*, 349 U. S. 294, 299-300, 75 S.Ct. 753, 756, 99 L.Ed. 1083.

"In this field of constitutional paramountcy, a placement or assignment statute is entitled to be accorded recognition only as an implement or adjunctive element on the part of a state for effecting an orderly solution to its desegregation difficulties, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the Brown cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result.

"But there is no need here to extend further these generalized observations. Reverting to the facial constitutionality of the Placement Act, it follows that the plaintiffs are without any general public-school right under Arkansas law to seek admission to a particular school, except on the basis of and in accordance with the provisions of that

Act. While their federal constitutional rights have been previously violated in that they have been required to attend a school segregated under administrative authority, the Placement Act provides a means for them now to seek admission to the school which they think they are otherwise entitled to attend and, insofar as the provisions of the Act are concerned, have their right to do so determined without regard to their race or color.

"Section 4 of the Act permits a Board of Education to delegate to the Superintendent of Schools the general task of making assignment of pupils among the schools of a District. But Section 7 makes provision for a right on the part of a parent or guardian of a pupil to file objections in writing to an assignment so made, to make request for a transfer of the pupil to a designated school, and to demand a hearing. The Board is required in such a situation to hold a hearing within a fixed time and to allow the presentation of evidence. 'It shall be the duty of each local Board to hear and consider all witnesses appearing before the said Board and having information pertinent and relative to the matter and to consider all relevant documentary evidence.' 'No final order shall be entered in such case until each member of the board of education has personally considered the entire records.'

"The Board must make findings of fact as a basis for its decision, 'and such findings and action shall be made a part of the records of the local Board.' Also, as has been mentioned above, there is a provision for having any claim of unconstitutionality in its action called to the Board's attention, through allowing to be filed 'an exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States \* \* \* ."

[*Separate Consideration*]

The court in its study of the individual applications for reassignment, the facts developed at the hearings and the conclusions reached by the defendants has endeavored so far as possible to consider separately the factual question and the question of law involved in each application. The established facts as disclosed by the record

of the hearing have been scrutinized in an effort to make certain that the constitutional rights of no student have been violated. The conclusions of the defendants are not based upon any hostility to racial desegregation, and point unerringly to the development of a program "pointed toward earliest practical completion of desegregation" within the meaning of the Brown decisions.

In the study of the actions taken by the defendants and attacked by the plaintiffs and the intervenors, the court has borne in mind that the actions of the defendants in the consideration of the applications for reassignment were required to be "within the focus and tests of its lack of disharmony with the objective, the obligation and responsibility dictated by the Brown cases."

In *Earnestine Dove, et al., v. Parham, et al.*, supra, the court said:

"Standards of placement cannot be devised or given application to preserve an existing system of imposed segregation. Nor can educational principles and theories serve to justify such a result. These elements, like everything else, are subordinate to and may not prevent the vindication of constitutional rights. An individual cannot be deprived of the enjoyment of a constitutional right, because some governmental organ may believe that it is better for him and for others that he not have this particular enjoyment. The judgment as to that and the effects upon himself therefrom are matters for his own responsibility.

"In summary, it is our view that the obligation of a school district to disestablish a system of imposed segregation, as the correcting of a constitutional violation, cannot be said to have been met by a process of applying placement standards, educational theories, or other criteria, which produce the result of leaving the previous racial situation existing, just as before. Such an absolute result affords no basis to contend that the imposed segregation has been or is being eliminated. If placement standards, educational theories, or other criteria used have the effect in application of preserving a created status of constitutional violation, then they fail to constitute a sufficient remedy for dealing with the constitutional wrong."

There is no evidence that the defendants have used the Arkansas Pupil Assignment Law of March 30, 1959, as an instrument for maintaining or effecting a system of racial segregation. On the other hand, it is clear that the defendants are using the Act as a means or an aid for effecting a sound and orderly distribution of pupils in relation to all problems of the public school system except those of purely racial consideration. Therefore, the claims of the plaintiffs and the intervenors of racial discrimination are without merit.

#### *[Four Complete Procedure]*

There were four Negro students who completed the administrative procedures before the Board but who are not named plaintiffs or intervenors. These students are Alice Louise Flakes, John Albert Jones, John Dickey Miller, and Carmela Jean Sells. Since they are not parties to this proceeding, the court is without jurisdiction to adjudicate their claim of a violation of their constitutional rights, if, indeed, such a claim is made. The record does not disclose whether these four students are attending school, and if so what school they are attending, or whether they desire to assert any claim.

In *Carson v. Warlick*, 238 F.2d 724 (4 Cir. 1956), the court, speaking through the late Chief Judge John J. Parker, at page 729 said:

"There is no question as to the right of these school children to be admitted to the schools of North Carolina without discrimination on the ground of race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted."

The right of Negro students to be admitted to the schools of the Little Rock School District without discrimination on the ground of race has been firmly recognized and adjudicated. This right extends to all Negro school children as individuals, and if a student is not admitted to a school of his choice after exhausting his administrative remedies before the School Board, he has a right as an individual to assert and to maintain a suit upon the allegation that his or her constitutional rights have been violated. But, as stated by Judge Parker, he must appear individually and not as one of a class.

At the trial the plaintiffs objected to certain testimony given by one of the defendants, Mr.

Tucker, on the ground that some of the testimony given by him was inadmissible as hearsay, and at the conclusion of the testimony of Mr. Tucker in chief, the plaintiffs moved to strike all of the testimony of the witness pertaining to the environment, conditions, and isolation and situation of the Negro students now enrolled in Central and Hall High Schools, and all testimony pertaining to a letter and contents regarding a visit from a Congressman to Little Rock as not being the best evidence, as being hearsay, and not relevant.

*[Testimony Admissible]*

At the time the court deferred ruling on the motion. Since the trial a transcript of all of the testimony of Mr. Tucker has been examined, and the court is of the opinion that the testimony objected to is relevant and admissible. Any isolated statements made by the witness, not based upon authentic records and reports made in the due course of the business of the school and under the direction of the Board of Directors, have been entirely disregarded by the court.

The plaintiffs also objected to the testimony of Dr. John E. Peters, a specialist in child psychiatry and Associate Professor of Psychiatry and Director of the Child Guidance Clinic at the University of Arkansas Medical School. The court has reexamined the testimony of Dr. Peters, and is of the opinion that his testimony is relevant and admissible.

Other contentions made by plaintiffs in the 64-page brief submitted to the court appear to be included in the issues decided by the court, or, if not embraced therein, are without merit, and it is not necessary to extend this opinion by further discussion of such contentions.

It must be remembered that the decisions of the Supreme Court of the United States and other appellate courts do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school district has been commanded. The law is simply that no child shall be denied admission to a school on the sole basis of race or color. In other words, the Constitution of the United States does not require integration. It merely forbids the use of governmental power to enforce segregation. In *Aaron v. Cooper*, 143 F.Supp. 855, (the first court decision of the long list of decisions involving the Little Rock schools), this court said:

"It is not the duty or function of the federal courts to regulate or take over and operate the public schools. That is still the duty of the duly state created authorities, but the free public schools must be maintained and operated as a racially nondiscriminatory system." (p. 864).

\* \* \* \*

"The federal trial court should maintain, if possible, a harmonious relation between state and federal authorities where the state authority, in this instance the Board of Directors, is proceeding in good faith to discharge its duties and thus to establish within a reasonable period of time a non-racial system of schools as required by the supreme law of the land." (p. 865).

\* \* \* \*

"This court is of the opinion that it should not substitute its own judgment for that of the defendants. The plan which has been adopted after thorough and conscientious consideration of the many questions involved is a plan that will lead to an effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions." (p. 866).

The law requires and the plan provides for a transition from a constitutionally discriminatory school system to a constitutionally nondiscriminatory school system. While this transition is in progress, we cannot lose sight of the realities and practicalities of the situation. We are dealing with children and their education, and the courts must consider the constitutional rights of the child along with the requirements of the school systems, and whether such requirements correspond with or conflict with the wishes of some of the students and their parents. It is understandable that certain students, as well as their parents, may entertain an abstract view of their rights or welfare that is not shared by the local school officials, who must constantly, in the solution of the varied problems and during the transition period, keep before them the broader prospective of the rights of students and the requirements of the school system. This broader prospective, implemented in good faith, may well necessitate during the transition period a denial of the wishes of a particular child or his parents. In relation to the problem of general achievement the court is entitled to require that the enjoyment of the right to desegregate "be



geared to a reasonable, definitive, transitional program of 'all deliberate speed.'"

*[Transitional Program]*

Under the facts in the instant case, the defendants have made every attempt and, in fact, are following a transitional program with "all deliberate speed." The law does not require that the door be open for admission on a "first come, first served" basis. If it were otherwise, we would soon have no order and no school system.

The courts have often recognized that many individual liberties guaranteed by the Constitution are not and cannot be unlimited. For example, there is no such thing as complete freedom of the press or speech, nor is there an unlimited or unrestrained freedom of students, white or colored, to select and "crash" their way into a particular school under the guise of choosing the direction in which their constitutional advantages lie.

Aside from the strictly constitutional or legal point of view, dedicated school officials must be and are concerned with transition in the sense of making the change in a manner to reach the desired end result without destroying children and the system in the process, and to arrive at a state of operation of a constitutional school system wherein all children can get at least as good an education, and preferably better, as was available to them in the former school system. The closer the goal is approached, the more successful is the transition. Realistically, everyone knows that the principal obstacles to the achievement of the ultimate goal arises because school boards are dealing with children with different backgrounds, race, academic achievement, emotional stability, ability to adjust emotionally under new and trying circumstances, and other relevant factors, rather than physical plant, teacher load, transportation, etc.

The defendants in the operation of the public school system in Little Rock must take the children as they find them. If, after application of assignment standards and criteria, the School Board in good faith concludes that particular children cannot make the change without injury to themselves or to other children with whom they will be associated, and to the school system, it should and must take action which will not subject the child to the change. In the application of these standards, if it appears that be-

cause of conditions arising from a social pattern, or otherwise, many children are not able to satisfactorily make the change in the early stages of the transition, this is merely the result of the indiscriminate application of the legal criteria and standards and obviously does not reflect or indicate unconstitutional discrimination.

The court believes that as time passes and the transition progresses, application of the same standards and criteria will progressively produce entirely different results as to the ability of particular students to make the change without unwarranted injury to themselves, other students and the school system.

*[Chaotic Conditions]*

It is not necessary for the court to refer again to the chaotic conditions that existed in the Little Rock high schools during the school year of 1957-58. However, those conditions cannot be forgotten by a law-abiding people. The defendants, through their dedication to their duties under the law and in a conscientious effort to do justice to all under the law, have brought order out of chaos. They deserve the support of every person who has an interest in the maintenance of a free school system operated in accordance with constitutional principles, to which we so often glibly give lip service.

In considering whether school authorities have discharged their primary responsibility in solving the problems of the operation of a non-discriminatory school system, courts are required to consider whether the action of such authorities constitutes good-faith implementation of the governing constitutional principles. The court has so considered the questions before it in this case, and is convinced that the action of the defendants herein complained of by plaintiffs was performed in the utmost good faith without bias or prejudice and with a desire and intention to protect and to enforce the constitutional rights of all concerned.

Therefore the motion of plaintiffs and of the intervenors should be dismissed, and an order in accordance herewith is being entered today. And it appearing that the enforcement of the rights heretofore recognized and adjudicated are personal to those who may assert that their rights have been and are being violated, there is no reason for the court to retain jurisdiction, and the order will omit provisions for the retention of jurisdiction.



## JUDGMENT

On March 22 and 23, 1960, the above entitled cause came on for trial to the court upon the motion of the plaintiffs and intervenors for further relief, the plaintiffs and intervenors appearing by Messrs. Wiley A. Branton, Thurgood Marshall and James M. Nabrit, III, their attorneys, and the defendants appearing by Messrs. Howard Cockrill, Robert V. Light and Herschel H. Friday, Jr., their attorneys. Evidence on behalf of the parties was presented and, at the conclusion thereof, the case was submitted and taken under advisement by the court, and the parties were requested to furnish briefs in support of their respective contentions.

Now, having considered the evidence adduced at the said trial, the briefs of the parties heretofore submitted, and the entire record of this cause, the court has prepared and filed herein its opinion relative thereto, and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the said motion for further relief filed by the plaintiffs and intervenors herein be and the same hereby is denied.

## Footnotes

1. A full and complete summary of the proceedings prior to January 9, 1959, is set forth in Aaron, et al., v. Cooper, et al., 169 F.Supp. 325-327.

Inter alia, it was provided in the order appearing in 169 F.Supp. 325-327, that the Board of Directors were allowed 30 days in which to submit a specific and detailed report of the affirmative steps they had taken and proposed to take in compliance with the order. The court retained jurisdiction.

In due time the then Directors filed their report, and on February 4, 1959, a hearing was held on the report which was approved over the objections of the plaintiffs and also the objections of the United States.

Subsequent thereto, Aaron, et al., v. McKinley, et al., 173 F.Supp. 944, was decided by a three-judge court. In that case the court on June 18, 1959, held unconstitutional Acts 4 and 5 referred to therein as the Acts of the General Assembly of the State of Arkansas, under which the high schools in Little Rock were closed. On December 14, 1959, the judgment of the three-judge court was affirmed by the Supreme Court of the United States, 361 U.S. 197, 80 S.Ct. 291, 4 L.Ed.2d 237.

2. "REGULATIONS OF THE LITTLE ROCK SCHOOL DISTRICT FOR THE ASSIGNMENT OF PUPILS, FOR THE RE-ASSIGNMENT OF PUPILS, AND FOR THE PROCESSING AND HEARING OF APPLICATIONS FOR RE-ASSIGNMENT OF PUPILS

## I.

## "ASSIGNMENT ON ORIGINAL ADMISSION

"Requests for original admission to the Little Rock School District Public Schools shall be made on forms approved and provided by the Board of Directors (in these regulations called the 'Board'). Such requests shall be fully completed

as to all information requested therein. The Superintendent of Schools shall submit to the Board his recommendation as to the assignment of such child. Thereafter, the Board shall assign such child to a school in the District and shall notify the parents in writing of the assignment, which notice shall be delivered to the parents or mailed to them at the address set forth on the request for original admission.

## II.

"ASSIGNMENT OF STUDENTS  
IN SCHOOL SYSTEM

"(a) The following assignments and procedure shall be applicable for the school year 1959-1960:

"(1) Each child enrolled in grades 1, 2, 3, 4, 5, 7, 8, and each child in grades 6 and 9 who was not promoted, of the schools of this District at the close of the school year 1958-59 is hereby assigned to the school designated on such child's Progress Report Card, as reflected by the Progress Report Card delivered to the child at the close of the 1958-59 school year and as reflected by the official records of the School District in the Administration Office at 8th and Louisiana. No additional notice shall be given of the assignments hereby made and any interested child or parent may make inquiry at the office of the Superintendent in the Administration Office at 8th and Louisiana.

"(2) Each child enrolled in grade 6 of the schools of this District at the close of the school year 1958-1959 who was promoted to the Junior High School level is hereby assigned to the Junior High School designated on the official records of the School District pertaining to such child on file in the Administration Office at 8th and Louisiana. No additional notice shall be given of the assignments hereby made and any interested child or parent may make inquiry at the office of the Superintendent in the Administration Office at 8th and Louisiana if there is any doubt as to the assignment of any child.

"(3) The Superintendent of Schools shall submit to the Board his recommendation as to the assignment of each child at the High School level (grades 10, 11 and 12). Thereafter, the Board shall assign each such child to one of the High Schools in the District and shall notify the parents of each child in writing of the assignment, which notice shall be mailed to them at the address reflected by the official records of the District.

"(b) The following procedure shall be applicable for each school year after the 1959-1960 school year:

"(1) During the month of May of each year, the Superintendent of Schools shall submit to the Board his recommendations as to the assignments for the next school year of each child enrolled in the schools of the District. Thereafter, but prior to the close of the school year then in progress, the Board shall assign each child in the schools of the District to a school for the next school year. Notice of the assignment shall be given by noting of the same on each child's Progress Report Card which is delivered to the child at the close of the school year then in progress. If, for any reason, a child does not receive a Progress Report Card, written notice of the assignment shall be mailed to the parents of such child at the address reflected by the official records of the District.

## III.

"OBJECTIONS TO ASSIGNMENT AND REQUESTS FOR RE-ASSIGNMENT OR TRANSFER  
OF STUDENTS

"(a) Parents who desire to object to the assignment

of a child to a particular school, or who desire re-assignment or transfer to a designated school or to another school to be designated by the Board, must file written application with the Board within ten (10) days from the date of the giving of the notice of assignment. The date of the giving of the notice of assignment shall be the date of the publication of these regulations in the case of assignments made hereby, or the date of the delivery of the Progress Report Cards to the children in the case of assignments noted thereon, or the date of the mailing of notice to parents in the case of all other assignments. If the tenth day falls on Saturday, Sunday or a holiday, the period for filing application shall extend to the next day that is not Saturday, Sunday or a holiday. Filing with the Board shall mean actual delivery to the Superintendent of Schools, or his authorized agent, at the Administration Office, 8th and Louisiana, during regular office hours.

"(b) Such applications objecting to the assignment or requesting re-assignment or transfer must be made on forms approved and provided by the Board. The application forms are available during regular office hours at the office of the Superintendent of Schools and, when open, at the several offices of the principals of the schools. Each application, completely executed as to all information requested thereby, must be personally signed by the parents of the child and must be verified before an officer authorized to administer oaths.

"(c) Upon receipt of any such application, the Board shall set a date for a hearing before the Board beginning within thirty (30) days from the filing of the application. The parents and the child must appear in person at the hearing but, in addition to their personal appearance, may have such representation as the parents and child desire. The parents shall be given at least seven (7) days' notice of the time, date and place of the hearing, which notice shall be mailed to them at their address reflected on the official records of the District in the Administration Office. The hearing of each application shall be confined to the particular application and shall be held separate and apart from a hearing on any other application.

"(d) The Board shall hear and consider all witnesses appearing before the Board and having information pertinent and relevant to the application and shall consider all relevant documentary evidence presented. In addition to hearing such evidence relevant to the individual child as may be presented on behalf of the applicant at the hearing, the board will conduct such investigations as it may deem necessary and may require such child, upon reasonable notice, to submit to interviews by agents or representatives of the Board, professional or otherwise, and to take oral, written, and/or physical examinations.

"(e) As promptly as possible after the hearing, the Board shall take final action on each application and the findings and conclusions of the Board shall be made a part of the official records of the Board. The parents of the child shall be notified promptly by mail of the final action of the Board. If dissatisfied with the final action of the Board, the parents of the applicant may file in writing an exception to the final action of the Board as constituting a denial of a right of such child guaranteed under the Constitution of the United States or of a right under the laws of the State of Arkansas, and the Board shall act promptly on such exception, and in any event within fifteen

(15) days after the filing thereof. The exception shall be filed on forms approved and provided by the Board, which forms may be obtained at the office of the Superintendent of Schools and, when open, at the several offices of the principals of the schools. Filing with the Board shall mean actual delivery to the Superintendent of Schools, or his authorized agent, at the Administration Office, 8th and Louisiana, during regular office hours.

"(f) Each child shall attend the school to which he or she is originally assigned until the Board reassigns the child to another school.

#### IV. "POWER OF BOARD TO CHANGE ASSIGNMENT

"Anything in these regulations to the contrary notwithstanding, the Board reserves the right to change the assignment of any child at any time when, in the opinion of the Board, the factors listed hereinafter in Article V, or any other relevant factor, require such change. Provided, however, that in each case of such change of assignment, and within the time prescribed in these regulations after due notice of the change of assignment, the parents of the child may make application setting forth objections to the assignment or requesting re-assignment or transfer, and the procedure prescribed hereinabove for the processing of such applications shall be followed.

#### V. "STANDARDS AND CRITERIA

"In making original assignments or in considering applications setting forth objections to assignments or requesting re-assignment or transfer, the Board shall consider all relevant matters pertaining to the best interest of the children, the efficient operation of the schools, and the efficient carrying out of the best possible educational program, including, but not necessarily limited to:

- "1. Available room and teaching capacity in the various schools;
2. Availability of transportation facilities;
3. The effect of the admission of new pupils upon established or proposed academic programs;
4. The suitability of established curricula for particular pupils;
5. The adequacy of the pupil's academic preparation for admission to a particular school and curriculum;
6. The scholastic aptitude and relative intelligence or mental energy or ability of the pupil;
7. The psychological qualifications of the pupil for the type of teaching and associations involved;
8. The effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof;
9. The effect of admission upon prevailing academic standards at a particular school;
10. The psychological effect upon the pupil of attendance at a particular school;
11. The possibility of breaches of the peace or ill will or economic retaliation within the community;
12. The home environment of the pupil;
13. The maintenance or severance of established and psychological relationships with other pupils and with teachers;
14. The choice and interests of the pupil;
15. The morals, conduct, health and personal standards of the pupil;
16. The request or consent of parents or guardians and the reasons assigned therefor.

VI.  
"MISCELLANEOUS"

"(a) Whenever the word 'parents' is used herein, it shall mean both parents of any child where both parents are living and residing in a household together with the child, or the parent with whom the child resides or who has custody of the child in the event of the parents living apart or of the parents having been divorced, or in the case of a guardian other than the natural parents of the child having been duly appointed, the word 'parents' shall mean such guardian, or if there be more than one guardian, then all such persons who have been duly appointed guardians, or if the child is residing with a person standing in loco parentis, the word 'parents' shall mean such person, or if more than one person, then all such persons standing in loco parentis.

"(b) These regulations are promulgated pursuant to the authority expressly conferred by the laws of the State of Arkansas, including without limitation Act 461 of the Acts of the General Assembly of the State of Arkansas for the year 1959. The full text of these regulations shall be published for one time in the Arkansas Gazette and in the Arkansas Democrat with the said publications to be as soon as possible after the adoption hereof, and said regulations shall be in full force and effect from and after the date of said publications.

Board of Directors  
Little Rock School District  
Everett Tucker, Jr., President  
Russell H. Matson, Jr., Vice-Pres.  
Ted Lamb, Secretary  
J. H. Cottrell  
B. Frank Mackey  
W. Clinton McDonald"

3. At the trial ten witnesses were introduced by plaintiffs together with nine exhibits. The defendants introduced two witnesses together with 76 exhibits. Defendants' Exhibits Nos. 6 and 27-76 were received in camera and will be further referred to in the course of the opinion.

4. One of the students in his exception to the final action of the Board alleged:

"The action of the Board denies rights of (name omitted) guaranteed under the Constitution of the United States and/or under the laws of the State of Arkansas in the following particulars:

"The actions of the Board of Directors and/or its subordinates and employees constitute racial discrimination and thereby deny to our child rights protected by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and further on the ground that actions of the Board of Directors with respect to our child were contrary to the provisions of the plan of desegregation adopted by the Board of Directors and judicially ordered to be enforced by several decisions of the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, and the United States District Court for the Eastern District of Arkansas in litigation, to which the Board of Directors was a party, variously styled in different proceedings as *Cooper v. Aaron*, *Aaron v. Cooper* and *Aaron v. McKinley*."

The testing and interviews occurred on August 31, 1959. The record contains a full psychological report as well as other information.

A hearing was held before the Board on September 9 attended by the student, his parents, and

his attorney. After setting forth the facts as developed at the hearing and excerpts from the statements made by the student's father, as well as the student himself, the Board concluded:

"\_\_\_\_\_ and the overall education program of the District would undoubtedly progress better and in view of the overall circumstances involved in this case, \_\_\_\_\_ would obviously have more educational opportunity at Mann than at Central. His transfer under his home and the other circumstances existing at this time would be to his detriment and would be to the detriment of the academic program and standards and academic progress of other students in the school system. It rather plainly appeared that \_\_\_\_\_ might well be subjected to rather powerful forces at home and at school which, during his formative years, might well have an adverse effect upon his future life. Under all of the circumstances, he would be much better off continuing his education with his friends under normal conditions.

"Conclusions"

"Under the findings set forth above, it is the unanimous opinion and conclusion of the Board that the requested reassignment of \_\_\_\_\_ from Mann High School to Central High School would not be in the best interests of \_\_\_\_\_ and of the educational program of the District and that his application be disapproved."

The application of the other student is in identical words except for the name as the one above referred to.

The interview and testing of this applicant occurred on September 3, 1959, and the hearing was held at a later date. Omitting the formal parts, the findings and conclusions of the Board in that case were as follows:

"\_\_\_\_\_ attended Dunbar Junior High School and last year took the first half of 11th grade English and history by correspondence from the University of Arkansas. He made a grade of 'B' on one and 'D' on the other. Most of his friends attend Mann and if he were assigned to Central he would be among strange teachers and students.

\_\_\_\_\_ was interviewed by the School Psychologist who reported to the Board and his History Sheet and scholastic background were examined by the Board.

"\_\_\_\_\_ did not enter school at the time the schools were opened and, therefore, has not been in compliance with the attendance regulations of the Board. His explanation was 'I want to know what school I am going to before I go.' \_\_\_\_\_ maintained a belligerent and unsatisfactory attitude during the hearings, which clearly reflect that an adjustment problem would be presented in the event his application were approved.

"He attended the meeting of students who were not in compliance with the Board's regulations for attendance at Dunbar Community Center and gave the reason for the meeting that the students wanted a press conference so that the press could be informed why they were not going to school. It was his opinion that the Board got its information on the reasons by virtue of being a member of the public. He stated that he would not comply with the Board's action on his application for reassignment but would take correspondence courses before attending Mann. Apparently his principal reason for requesting the application was 'I had rather integrate.'

"Based upon all the evidence considered by the Board it was obvious that \_\_\_\_\_ would undoubtedly progress better at Mann than at Central and there were more education opportunities and school activities available for him at Mann than at Central. He is not sufficiently prepared to cope with the adjustment problem that would undoubtedly arise and his transfer would be to his detriment and to the detriment of the curricular and academic program and

standards and academic progress of other students at Central.

"Conclusions

"Under the findings set forth above it is the unanimous opinion and conclusion of the Board that the requestion reassignment of \_\_\_\_\_ from Mann High School to Central High School would not be in the best interests of \_\_\_\_\_ and of the educational program of the District and that his application is unanimously disapproved."

## EDUCATION Public Schools—Arkansas

Earnestine DOVE, a minor, by her father, etc. v. Lee PARHAM, etc. et al.

United States Court of Appeals for the Eighth Circuit, August 30, 1960, 282 F.2d 256.

**SUMMARY:** Negro students brought action in federal court against a Jefferson County, Arkansas, school district, seeking an order requiring their admission to a specified school in the district without regard to the state Pupil Assignment Act of 1956 [1 Race Rel. L. Rep. 579, 1077 (1956)], which was in effect when the action was brought, or to the state Pupil Placement Act of 1959 [4 Race Rel. L. Rep. 747 (1959)], which was in effect when it came to trial. Because the constitutionality of both statutes was challenged, a three-judge court was convened; but, finding the statutes not unconstitutional on their faces, that court dissolved itself. On subsequent trial, the single-judge court declared both acts to be constitutional on their faces, because virtually identical to the Alabama School Placement Law upheld in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101, 3 Race Rel. L. Rep. 867 (1958). A motion to dismiss for failure to exhaust administrative remedy under the 1956 Act was denied. The court found that throughout the 1957-59 period during which plaintiffs had sought admission to district white schools, defendants had maintained a rigid racial segregation policy. Therefore, although plaintiffs technically had not exhausted all administrative remedies under the Act, the court held that "actually" they had done so when three applications for admission had already been denied, and further petition for a board hearing would have been futile. The court found that plaintiffs had been illegally denied admission to white schools solely because of race, there being no proof that plaintiffs did not have the same qualifications as white children admitted. Defendants were ordered to admit plaintiffs to white schools at the beginning of the 1959-60 school year, enjoined from engaging in acts which would impede the progress of plaintiffs as they attend such schools, and ordered to proceed with and apply the rules prescribed in the 1959 Act. 176 F.Supp. 242, 5 Race Rel. L. Rep. 43 (1959). The Court of Appeals for the Eighth Circuit affirmed the holding that the Acts of 1956 and 1959 were not unconstitutional on their faces; but it reversed the holdings that defendants were not entitled to invoke the 1959 Act and that plaintiffs were not required to exhaust the administrative remedies provided by the Acts, and vacated the injunction directing plaintiffs' admission. It was held that the assignment statute could properly be disregarded before its use only upon a legal certainty that it would be applied as a subterfuge for effecting an unconstitutional result. The court directed, however, that defendants be enjoined from continuing to maintain segregation, and that the proceedings remain open on the records of the district court to allow a supplemental complaint in case of an unconstitutional application of the 1959 Act. 271 F.2d 132, 5 Race Rel. L. Rep. 43. Shortly after the decision, plaintiffs applied for transfer to a white school. They were given physical examina-



tions, intelligence tests, and an interview by a psychiatrist, and the school board held a hearing. After these proceedings, the transfers were denied. Plaintiffs petitioned the court for relief. The school board asked for a dismissal, arguing that plaintiffs should have further pursued their administrative remedy by appealing the action to the state circuit court, as provided by the statute. The board also contended that there had been no substantive unconstitutional action in disposing of the petitions. The district court held that it was not necessary for plaintiffs to pursue the state judicial remedy, and found that, while racial factors had been considered in the board's action, no "good purpose would be served by remanding the case to the board for further consideration of the individual assignments without regard to race. . . ." The court then directed the school board to eliminate the compulsory segregation prevailing in the district, and to submit an affirmative plan for the elimination of segregation by applying the Arkansas Pupil Assignment Law. Subsequently the board submitted a plan which provided that during the transition period, race will be given consideration "as an existing fact"; that "lateral transfers" will generally be discouraged, except in exceptional cases, such as the availability of courses only in certain schools; that students generally will be assigned to the same school as the previous year; and that the "exceptional case" consideration will not apply to first year students. The board envisioned no specific time to complete the transition, but noted "as time goes by, race will probably eliminate itself as one of the factors brought into play. . . ." The court accepted the plan as a good faith start toward integration, but kept the case open to hear complaints from any students or group of students who felt aggrieved by application of the plan. 181 F.Supp. 504, 183 F.Supp. 389, 5 Race Rel. L. Rep. 349 (1960). Both sides appealed this holding, plaintiffs contending that they should have an injunction directing their admission to the white school, and that the court erred in approving the transition plan. Defendants contended that the court erred in holding that it had jurisdiction to deal with the complaint of plaintiffs on its merits, and was not required to make dismissal on the basis that plaintiffs had not exhausted their administrative remedies. The Court of Appeals for the Eighth Circuit affirmed the order denying specific relief, and affirmed the right of the court to deal with the complaint on its merits. However, the court held that the board's announced plan did not amount to a "reasonable start" toward desegregation, and remanded the case to require "the board . . . to come forth with something more objectively indicative as a program of aim and action than a speculative possibility wrapped in dissuasive qualifications." The text of that opinion and order follow.

Before JOHNSEN, Chief Judge, MATTHES, Circuit Judge, and DELEHANT, District Judge.

JOHNSEN, Chief Judge.

These appeals are from orders made by the District Court, 181 F.Supp. 504 and 183 F. Supp. 389, in a transition by Dollarway School District No. 2, Jefferson County, Arkansas, from a segregated to a desegregated school system. Involved are the things which have occurred in the situation since our remand in *Parham v. Dove*, 8 Cir., 271 F.2d 132.

One of the directions in our mandate, 271 F.2d at p. 135, was that an injunction should be entered against the District and its officers to prevent them from continuing to maintain, as against the student plaintiffs and the class represented by them, the system of unconstitutional segregation to which the District had been subjecting them in their educational process.

This direction was made because the school

board had up to that time taken no steps, even of a transitional nature, to bring about the disestablishment of the existing unlawful status—which a recognition of the responsibility made clear by the *Brown* cases, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, ought by then to have prompted.

#### [Role of Statute]

We held, however, that, in view of the enactment of a state pupil placement or assignment statute, Act No. 461 of 1959, Ark. Stats. §80-1525 et seq., the District would not be summarily required to make admission of the three individual plaintiffs involved to the school they sought to attend, but should be afforded the opportunity to make use of the provisions of the statute as a



means or an aid in effecting an orderly location of pupils generally, in relation to the various factors which could be involved as to distribution in its school system, except those of purely racial consideration. 271 F.2d at p. 137.

The recognition of facial validity which we thus gave to the statute was on the basis of it constituting a "legislative non-racial scheme", intended to serve in effecting student location through "overall pattern", instead of by promiscuous result. *Id.* at p. 138. But we cautioned that "the statute cannot \* \* \* be made to serve, through artificial application, as an instrument for maintaining \* \* \* a system of racial segregation". *Id.* at p. 136.

Judicial persuasion would not normally tend to be produced that a placement or assignment statute was being used as an auxiliary in effecting an orderly solution of a school district's integration problems, where the district had refrained from adopting any program to disestablish its previous racial discrimination, where the only application of the statute engaged in by it was to Negro students seeking to escape their segregated status, and where the only result brought about thereby was to leave the racial situation in the school system remaining exactly as before.

#### [Can Not Preserve Segregation]

Standards of placement cannot be devised or given application to preserve an existing system of imposed segregation. Nor can educational principles and theories serve to justify such a result. These elements, like everything else, are subordinate to and may not prevent the vindication of constitutional rights. An individual cannot be deprived of the enjoyment of a constitutional right, because some governmental organ may believe that it is better for him and for others that he not have this particular enjoyment. The judgment as to that and the effects upon himself therefrom are matters for his own responsibility.

In summary, it is our view that the obligation of a school district to disestablish a system of imposed segregation, as the correcting of a constitutional violation, cannot be said to have been met by a process of applying placement standards, educational theories, or other criteria, which produce the result of leaving the previous racial situation existing, just as before. Such an absolute result affords no basis to contend that the imposed segregation has been or is being

eliminated. If placement standards, educational theories, or other criteria used have the effect in application of preserving a created status of constitutional violation, then they fail to constitute a sufficient remedy for dealing with the constitutional wrong.

Whatever may be the right of these things to dominate student location in a school system where the general status of constitutional violation does not exist, they do not have a supremacy to leave standing a situation of such violation, no matter what educational justification they may provide, or with what subjective good faith they may have been employed. As suggested above, in the remedying of the constitutional wrong, all this has a right to serve only in subordination or adjunctiveness to the task of getting rid of the imposed segregation situation.

#### [Basis of Previous Decision]

That was the basis on which we held in our previous opinion, 271 F.2d at p. 137, that the District was entitled to a use of the placement or assignment statute in relation to its desegregation task, when we stated that the statute was being accorded recognition "only as an implement or adjunctive element for effecting an orderly solution of (the District's) desegregation difficulties, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the *Brown* cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result".

What has been said up to this point is foundational to our dealing with the questions presented by these appeals. Three appeals are before us. The first one, No. 16,437, involves a determination of whether the trial court was entitled to dismiss the complaint of the plaintiffs and deny them relief from the school board's refusal to admit them to the school they sought to attend. The second case, No. 16,448, is a cross-appeal by the District and the school board from the holding of the court that it had jurisdiction to deal with the complaint of the plaintiffs on its merits and was not required to make dismissal thereof on the basis that the plaintiffs had not exhausted their administrative remedies under the placement or assignment statute in respect to the board's action of denial against them. The third appeal, No. 16,487, is by the plaintiffs from the approval granted by the court

to the transitional plan and program filed by the District after the other decisions here involved, in response to a requirement of the court that it submit "an affirmative statement of its plans and policies designed to bring about an end to compulsory racial segregation in (its) public schools".

#### I.

It is, we think, quite generally recognized that a solution to the problem of effecting desegregation will in most instances have to come through a series of progressive, transitional steps. And the *Brown* decisions appear to permit of the handling of a situation in this manner, provided the school district engages in making a "reasonable start toward full compliance" and continues to move forward with "all deliberate speed".

The question here as to the propriety of the court's approval of the school board's plan and program for bringing about an end to the compulsory segregation existing in the District's school system thus is in its overall significance the most important one before us, and it will accordingly be first considered.

The approval order was made on the basis of the court's expressed view "that the plan provides a start toward the elimination of racial discrimination, and that it is sufficient to initiate a transition period". 183 F.Supp. at p. 393. Our difficulty with this is that what the school board has said it intends to do does not seem to us to contain any demonstrable objectivity, of either effort or aim, so as realistically to be appraisable as a "reasonable start"—not in subjectivity, but in affirmative effort.

In substance, the plan states generally that the school board intends to use the provisions of the Arkansas pupil placement or assignment statute in respect to any application made for admission to a school, other than the one which the student is now attending. Application of the provisions of the statute will be made, the plan states, in relation to such policies as that "it is undesirable and unsound educationally to transfer a child from the school which he is presently in attendance (at) to a different school"; that "the Board should give favorable consideration to applications for the lateral transfer of students (that is, the transfer of a student from one school in the District to another school in the District) only in exceptional cases"; and that "When an exceptional case is found by the Board to exist, a lateral transfer may be granted if, in the opinion of the Board, the pupil can make the

necessary adjustment and perform and achieve satisfactorily in the school to which transfer is requested."

The steeping of the provisions of the placement statute in such dissuading abstractions, where the board has never given any indication of an existing desegregation opening (such as an announced intention or undertaken action to admit some contemplated number of Negro students, by a designated time, at a particular level), does not afford much basis for it to say, or for a Negro realistically to believe, that the opportunity exists for such students, either in whole or part, to escape from their imposed segregation status. And the more is this persuasion impelled as to the present situation, in that the only result which the District has demonstrated is subject to being produced by a use of the statute on the foregoing basis is to leave the segregation situation remaining, just as it is.

#### [Tests for Applicants]

Relatedly, it may be noted that in its announced climate of principles for using the placement statute, the District has further made its processes of application of the statute consist in having applicants for transfer subjected to such devices as the California Mental Maturity Test, the Iowa Silent Reading Test, the Otis Quick Scoring Test of Mental Ability, the California Language Tests, the Bell Adjustment Inventory, and other such things—which, at least in the elementary area of public education, are new adornments upon the entrance doors to school houses and class rooms.

Again, in what the District has done and proposes to continue doing, application of these devices is not going to be made to the students generally of the system but only to such individuals as undertake to engage in application for a transfer—which in the realities of the District here simply means, to Negro students seeking to enter a white school.

The District admittedly has no intention to engage in any such general application of these devices as to enable it to effect a reconstruction or reorganization of its school system or its class room on the basis of the levels that might be arrived at from such individual scorings. Nor can it be said to intend to make the statute serve as a means for making a choice or selection among Negro students in relation to each other, for purposes of some initial, limited, transitional step in effecting the disestablishment of its

segregation system—because the plan does not contain any definitive expression of indicated opening at any point for the admission, as suggested above, of some contemplated number of Negro students, by a particular time, at a designated grade-level.

The plan does engage in a use of some general softening language in respect to first-grade students, but it does not set forth any definitive program or step on the board's part for so effecting desegregation, or hold forth any promise of such a result, as a "reasonable start" at this level.

#### *[Considerations Inapplicable]*

The board's statement says generally that "the educational considerations which make lateral transfers undesirable and unsound do not exist, for the most part, in the case of first graders"; that "they have not established relationships with teachers, formed extensive friendships, become adjusted to a particular environment, established a curriculum pace, adopted a particular course of study, etc."; that "first graders do not have prejudices and fixed ideas concerning traditions to the extent that older students have"; and that "Therefore, the Board is not concerned 'with exceptional cases' in the sense involved in lateral transfers".

But to this there is added that "there must necessarily be a more extensive review of all facts relevant to the assignment criteria in making the initial assignment of first graders", and that the board "will make this more extensive review". And while it further is said in general terms that the opportunity will be given for pupils and their parents to make indication of school preference as to initial first-grade assignment, this is followed by the declaration that such assignments will be made "consistent with available school facilities, current teacher load, curriculum, emotional stability, readiness ability, adjustment potential and related matters".

Thus, the board has presented no objective plan for the admission of any Negro students to the first grade of its two white schools, as a step in the process of effecting desegregation in its educational system. It has not held out any indication of reasonable opportunity as a basis for such requests of initial assignment to be chosenly made. Nor has it stated that it is ready to make any such desegregating assignments. Instead, it in effect says that, before it can answer that question, it must, even as to first graders, delve into such things as "emotional

stability, readiness ability, adjustment potential, and related matters".

#### *[Requirements for Board]*

The trial court, on careful consideration, was of the opinion that "The provisions for the initial assignment of first graders are fair on their face and are sufficient, if applied in good faith, to give at least some Negro children entering school for the first time in September of the current year (1960-1961) a reasonable chance of being assigned to the heretofore all-white Dollarway School". 183 F.Supp. at p. 392. But, after a lapse of six years, we think a board should be required to come forth with something more objectively indicative as a program of aim and action than a speculative possibility wrapped in dissuasive qualifications.

What has been said above should be sufficient to indicate to the board its obligation to do more than to engage in generalities. Placement standards and educational doctrines are entitled to their proper play, but that play, as we have emphasized, is subordinate to the duty to move forward, by whatever means necessary, to correct the existing constitutional violation with "all deliberate speed".

We had intended to hold up the filing of this opinion until after the board had taken such action and produced such result as it intended to operate its school system under during the immediately pending school year. The press now contains a dispatch, indicating that the board has announced that it has assigned one 6-year-old Negro girl to the first grade in one of its two white schools for the pending year, and quoting the board as stating that it hoped that its action would help preserve the Arkansas pupil assignment law. We do no more than to note the item. The trial court may possibly desire to have indication made, in the more definitive expression of program which the board is being required to make, of what scope of opportunity generally was afforded for admission, in relation to such action.

#### *["Good Faith" Criterion]*

Two further comments should perhaps here be made. Both we and the trial court have regarded the board as having been acting with subjective good faith. The question here, however, is not state of mind but required action. Required action is measurable only by objectivity.

The second relates to the statement of the trial court, 183 F.Supp. at p. 393, as follows: "The Board has stated with candor that in making assignments consideration will be given to race. As indicated, where a transition period has been initiated, limited consideration in assigning students may be given to race".

Where a board has adopted a definitive plan of effecting desegregation by reasonable transitional steps, the racial question necessarily is geared to the scope of those steps. But only in that sense and within that need, we think, is there basis to say that consideration in assigning students may be given to race. The board may in such a situation find it necessary to make selection between Negro students, and it will be entitled to do so on proper judgment as to what will best serve to accomplish its program. However, as we have said above, it has no right to resolve or take action at any time on the basis that it is better for some individual not to have the enjoyment of his constitutional right.

## II.

As to appeal No. 16,437, relating to the court's refusal to order the three Negro plaintiffs admitted to the 12th and 9th grades respectively of the school they sought to attend, we think that the court was entitled to require in relation to the problem of general achievement, that the enjoyment of their right to desegregation be geared to a reasonable, definitive, transitional program of "all deliberate speed".

That problem, in its sound solution, is in most instances one for general, orderly, reasonable progression. Where the court concludes that a board is warranted in so proceeding, it does not have to leave the door subject to general crash efforts, on a "first come, first served" basis and consequence. This is not to say, of course, that such action may not be resorted to, where it appears to be necessary in order to break down the segregation barrier.

## III.

There remains for consideration No. 16,448, the appeal of the District and the school board from the court's refusal to dismiss the complaint for lack of jurisdiction to consider its merits.

The contention made is that the plaintiffs

could not resort to the federal court against the action of the board in denying their applications for transfer, at least until after they had exhausted the remedies of appeal provided from such action to the State Circuit Court and State Supreme Court. The District and the board regard the appeals which are so provided for in the statute as part of the administrative process existing under the placement or assignment statute as part of the administrative process existing under the placement or assignment statute in respect to an application for transfer. Section 80-1531 of the Arkansas Statutes, as here pertinent, provides for a right of exception to the action of a school board in its assignment of a student, "as constituting a denial of any right of such minor guaranteed under the Constitution of the United States". If the board does not reconsider its action, "an appeal may be taken from the final action \* \* \*, on such [constitutional] ground alone, to the Circuit Court \* \* \* by filing \* \* \* a petition stating the facts bearing on the alleged denial of his rights under the United States Constitution \* \* \*".

While the section further provides that "the Circuit Court will try the said cause de novo", it seems apparent, from the provision as to the scope of the exception to be made before the board and the requirement as to the contents of the petition ("the facts bearing on the alleged denial of his [constitutional] rights"), that the question which the court is intended to try is that of constitutional violation. Thus, the state remedy afforded is judicial and not administrative in its character and function. Judicial remedies of state courts for vindication of federal constitutional rights do not have to be exhausted, before there can be resort to a federal court, unless some federal statute so requires as to a particular legal situation. *Lane v. Wilson*, 307 U.S. 267, 274, 59 S.Ct. 872, 875, 83 L.Ed. 1281. See also *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24, 30, 54 S.Ct. 259, 78 L.Ed. 628; *Carson v. Warwick*, 4 Cir., 238 F.2d 724, 729.

## IV.

Cases Nos. 16,437 and 16,448 are affirmed. The order appealed from in Case No. 16,487 is vacated, and the cause remanded for further proceedings.



## EDUCATION

## Public Schools—Delaware

Mary Ann EVANS, an infant, etc. v. Jane ENNIS et al., etc.

United States Court of Appeals, Third Circuit, July 19 and August 29, 1960, 281 F.2d 385.

**SUMMARY:** Class actions in federal district court in Delaware resulted in a judgment directing defendant state and local school officials to present plans for integration and to admit plaintiff Negro school children to specific named schools on a nondiscriminatory basis. *Sub nom. Evans v. Buchanan*, 145 F.Supp. 873, 2 Race Rel. L. Rep. 7 (1956); 149 F.Supp. 376, 2 Race Rel. L. Rep. 301, 781 (1957), affirmed 256 F.2d 688, 3 Race Rel. L. Rep. 901 (1958). The State Board of Education then submitted a plan providing for grade-by-grade desegregation over a twelve-year period, beginning with all first grades at the fall term, 1959. The plan was approved, except for a paragraph reading, "Whenever possible every pupil in the grades affected . . . shall have the choice of (a) attending the nearest school within the district where he resides or (b) attending the school he would have attended prior to the effective date of the order," which the court ordered eliminated as discriminatory. 172 F.Supp. 508, 4 Race Rel. L. Rep. 257 (1959). Defendants petitioned the court that this paragraph be restored or in the alternative, that the plan contain a provision permitting each local board to establish attendance areas. The alternative was rejected as "unacceptable" both from a practical and a legal standpoint; and the court refused to restore the paragraph ordered eliminated, because its application would discriminate against Negroes in some situations. The court also ruled that the plan need not contain a provision for uniform attendance areas throughout the state, because the state board already had power to establish attendance areas, and all students would be compelled to abide by the board's rules if the rules were nondiscriminatory in character and fairly administered. 173 F.Supp. 891, 4 Race Rel. L. Rep. 574 (1959). Plaintiffs appealed from this order, contending that it was not in compliance with the 1957 order for immediate statewide desegregation, and that it did not comply with the mandate in the *School Segregation Cases*. The Court of Appeals for the Fourth Circuit agreed with the contention and reversed the judgment. The court, while conceding that in some situations grade-by-grade integration may meet the criteria laid down by the Supreme Court, held that under the circumstances existing in Delaware such a process does not constitute desegregation with all deliberate speed. Therefore, the Board was ordered to admit the named plaintiffs immediately and to present a plan to the district court by December, 1960, for full integration of all grades in the public schools of Delaware in the fall of 1961. On rehearing, the court amended its judgment to allow the school board to apply the customary processing relating to capabilities, scholastic attainments, and geographical location to both the plaintiffs ordered immediately admitted and to the plan for general desegregation. An application for a stay of execution of the judgment of the Court of Appeals for the Third Circuit was denied by the United States Supreme Court on September 1, 1960. See 5 Race Rel. L. Rep. 613, *supra*.

Before BIGGS, Chief Judge, and GOODRICH and KALODNER, Circuit Judges.

BIGGS, Chief Judge.

The background of these appeals is stated in *Evans v. Buchanan*, 152 F. Supp. 886 (D. Del. 1957), and 256 F.2d 688 (3 Cir. 1958). After our remand, the court below directed the defendant, the State Board of Education of Delaware, and the defendant, George R. Miller, Jr., State Superintendent of Public Instruction, to submit to it a plan of desegregation. A proposed

plan was submitted and was approved with certain modifications. See *Evans v. Buchanan*, 172 F. Supp. 508, and 173 F. Supp. 891. On July 6, 1959, the court below entered a final order approving the plan. This is the order appealed from.

It is sufficient to state here that the plan as approved provides for the desegregation of the Delaware Public School System on a grade-by-grade basis over a period of 12 years beginning



with all first grades at the Fall term, 1959. The plaintiffs-appellants object to this plan on two grounds. First, they assert that the plan is not in accord with the mandate of this court which they say in substance approved the order of Judge Leahy entered in the court below on July 15, 1957, and which in their view required immediate state-wide desegregation in all schools and at all grades. Cf. our opinion at 256 F.2d 688. The plaintiffs' second objection is that the plan as approved by the court below does not follow the intent and substance of the decisions of the Supreme Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), in that the plan does not effect desegregation "with all deliberate speed" and is not a "reasonable start toward full compliance" with the ruling of the Supreme Court in its *Brown* opinion of May 17, 1954.

#### [Problems Feared]

In its opinions the court below has reached the conclusion that the plan approved is a necessary and proper, if not the only feasible, one, and that integration at a more rapid rate would overcrowd the schoolrooms, overtax the teachers, and have a most undesirable emotional impact on some of the socially segregated communities of Delaware. The court below concluded in substance that desegregation at a more rapid rate than that approved by it would prove to be a disruptive and futile proceeding which might do great harm to the Delaware School System.

We cannot agree. We affirmed the decree of Judge Leahy which in plain terms required statewide integration of the public school system of Delaware in all classes by an adequate plan by the Fall term 1957, and which enjoined designated defendants from refusing admission to Negro children on a racially discriminatory basis. The plan approved by the court below is not in accordance with Judge Leahy's decree or with the mandate of this court. Desegregation of the Delaware public school system on a grade-by-grade basis over a period of 12 years, beginning as it did in the Fall of 1959, does not follow the intent and substance of the rulings of the Supreme Court in *Brown v. Board of Education of Topeka*, *supra*.

The plan and the evidence of many of its proponents seem to us to be fraught with unreality, though undoubtedly the witnesses, the defendants, and indeed all concerned, have acted in good faith. It appears from Exhibit No.

11, "Population by School Districts and High School Areas, January 1959", that the approximate number of Negro children available for desegregation in Delaware was 6,813 and that the number of Negro children eligible or available for desegregation in the first grades as of that date was approximately 1,000. The affidavit of June 10, 1959, of Superintendent Miller, states that the number of Negro children applying for entrance into the first grades of those "White Schools", which previously had not had plans for desegregation approved by the State Board of Education, amounted to only 25.<sup>1</sup> Percentage-wise, therefore, the number of Negro children who registered for entrance into the first grades in the Fall of 1959 was approximately 2.5% of those available as set out in Exhibit No. 11.<sup>2</sup> If the same percentage be applied to the 6,813 Negro children referred to in Exhibit 11: *viz.*, if 2.5% of 6,813 be taken, 170 Negro pupils would have registered from grades 1 to 12 inclusive. Even if this number be trebled the number of Negro children involved if desegregation took place through grades 1 to 12 would barely exceed 500. Doubtless there would be some overcrowding in particular schools as suggested by State's Exhibit 14 and many temporary or permanent rearrangements in school facilities relating to teachers, school houses, school rooms, and transportation would have to be made, but it is unrealistic to suggest that all Negro pupils now in segregated schools would immediately seek admission to desegregated schools. The fact that there must be deemed to be a diminution in the number of Negro children seeking integration, *viz.*, in the number seeking immediate integration as estimated by some of the defendants, is indicated by the fact that of the 42

1. Reference to this fact is made in the star note to Judge Layton's supplemental opinion, 173 F. Supp. at p. 892.

2. It should be pointed out, however, that the figure of 1,000 Negro children, given by Exhibit 11, is an estimate based on the number of Negro children who had entered the first grades in the Fall of 1958, whereas the total of 25 Negro children represents the actual number who registered in June 1959, for entrance in September 1959 to the first grades in "White Schools" which previously had not had plans for desegregation approved by the State Board of Education.

We do not have in the record the exact number of Negro children eligible or available for entrance into the first grades on a non-segregated basis in September 1959, but we are of the opinion that the "Population" figures given in Exhibit 11 are close to the number of Negro children available for desegregated entry into the first grades and that only about 2.5% of these children applied for such entry.

infant plaintiffs who originally sought relief, approximately 24 have ceased to be active plaintiffs and no longer seek to be integrated. Some of these 24 doubtless have graduated but even if we assume that the number graduating amounts to 10% of the total, it is clear that the number of active plaintiffs still seeking integration is approximately only 20. It has been the experience in school desegregation that a large number of Negro children do not seek integration even when offered the opportunity. This is common knowledge. We cannot conclude that the situation in Delaware will be noticeably different in this respect than in other critical areas the schools of which already have been successfully integrated. It is the fact that if the plan as approved by the court below be not drastically modified a large number of the Negro children of Delaware will be deprived of education in integrated schools despite the fact that the Supreme Court has unqualifiedly declared integration to be their constitutional right. We cannot believe that such a result is a correct or just one.<sup>3</sup>

#### [Emotional Impact]

As we have indicated one of the main thrusts of the opinion of the court below is that the emotional impact of desegregation on a faster basis than that ordered would prove disruptive not only to the Delaware School System but also to law and order in some of the localities which would be affected by integration. We point out, however, that approximately 6 years have passed since the first decision of the Supreme Court in *Brown v. Board of Education of Topeka*, *supra*, and that the American people and, we believe, the citizens of Delaware, have become more accustomed to the concept of desegregated schools and to an integrated operation of their School Systems. Concededly there is still some way to go to complete an unqualified acceptance but we cannot conclude that the citizens of

Delaware will create incidents of the sort which occurred in the Milford area some five years ago. We believe that the people of Delaware will perform the duties imposed on them by their own laws and their own courts and will not prove fickle to our democratic way of life and to our republican form of government. In any event the Supreme Court has made it plain in *Cooper v. Aaron*, 358 U.S. 1, 16 (1958), the so-called "Little Rock case", that opposition is not a supportable ground for delaying a plan of integration of a public school system. In this ruling the Supreme Court has acted unanimously and with great emphasis stating that: "The constitutional rights of respondents [Negro school children of Arkansas seeking integration] are not to be sacrificed or yielded to . . . violence and disorder . . .". We are bound by that decision.

Doubtless integration will cost the citizens of Delaware money which otherwise might not have to be spent. The education of the young always requires, indeed demands, sacrifice by the older and more mature and resolute members of the community. Education is a prime necessity of our modern world and of the State of Delaware. We cannot believe that the citizens of Delaware will prove unworthy of this sacred trust.

#### [Personal Right]

In *Lucy v. Adams*, 350 U.S. 1 (1955), the Supreme Court indicated, as we have never doubted, that individual plaintiffs in a class suit such as those at bar, have a personal right to immediate enforcement of their claims if such be feasible. We can perceive no reason why the individual infant plaintiffs who presently actively seek integration should not be granted that right immediately.

For the reasons stated we disapprove the plan insofar as it postpones full integration. The judgment appealed from will be vacated. The court below will be directed to enter an order requiring the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit to the court below on or before December 1, 1960, for its approval a modified plan which will provide for full integration of all grades of the public schools of Delaware commencing with the Fall term 1961. The court below also will be directed to order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Edu-

3. Evidence has been introduced to the effect that the intelligence of Negro children in Delaware as demonstrated by intelligence and aptitude tests is less to some degree than that of Caucasian children. We have examined this evidence carefully and we conclude that the asserted disparity in intelligence between Negro and Caucasian children is not of such a degree as to prevent or even to hinder substantially their mutual desegregated education. Some adjustments may be necessary from grade to grade but this is a matter which the competent Delaware school authorities will be able to handle adequately administratively.

cation in the School Districts as named above, to integrate commencing with the Fall term 1960, the respective individual infant plaintiffs who presently actively seek integration. The court below also will be directed to enter an order requiring, except as hereinbefore provided with respect to the individual infant plaintiffs, the continuation of the grade-by-grade integration presently in effect until the modified plan providing for full integration as contemplated by this opinion be put in operation.

### Dissent

GOODRICH, Circuit Judge

This is a difficult case to decide. Much harder, for instance, than to determine whether a given profit is ordinary income or capital gain. The reason that it is hard is because the test for its solution is not capable of being stated in cate-

gorical terms. The direction is to proceed with desegregation with all deliberate speed. The school authorities in this case may well be charged with proceeding with more deliberation than they have with speed.

Nevertheless, I am unable to join with my colleagues in the order which they propose. It would be better, perhaps, if the program submitted to the district judge and approved by him had provided for speedier integration. But a plan was submitted and a plan was approved and has been put into effect. While it will take a comparatively long time before it is completed it, nevertheless, provides for steady progress. It seems to me that in view of the local social inertia against any plan at all that the one submitted and approved is as good as we can expect in view of the obstacles to be overcome in making it work. I would, therefore, affirm the judgment of the district court.

### Amended Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these cases be, and the same are hereby vacated, with costs, and the causes remanded to the District Court with directions to:

(1) order the individual defendants, respectively members of the Boards of Trustees or of the Boards of Education of the School Districts as named above, to integrate, commencing with the Fall Term 1960, the respective individual infant plaintiffs who presently actively seek integration, subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments, and geographical locations; providing nonetheless that that processing is conducted on a racially non-discriminatory basis as set out in the opinion filed concurrently with this judgment;

(2) enter an order requiring the members of the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit on or before December 31, 1960 for the approval of the District Court a modified plan of integration which will provide

a. for the integration at all grades of the public school system of Delaware, at the

Fall Term 1961, and at all subsequent school terms, of all Negro school children who desire integration subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments, and geographical locations, providing nonetheless that that processing is conducted on a racially nondiscriminatory basis as set out in the opinion filed concurrently with this judgment;

b. for a "wholly integrated" school system, as that term is employed in the opinion filed concurrently with this judgment and as provided in the opinion, whereby adequate wholly integrated school facilities at all grades of the public schools of Delaware shall be provided for all school children, white and Negro, whose attendance at public schools is required by law, subject, however, to the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, providing nonetheless that that processing is conducted on a racially non-discriminatory basis as set out in the opinion filed concurrently with this judgment;

(3) enter an order requiring that, except as hereinbefore provided with respect to the individual infant plaintiffs, who shall seek to be integrated at the Fall Term, 1960, the continua-

tion of the grade-by-grade integration presently in effect and approved by the District Court until the modified plan to the extent provided

in paragraph 2(a) of this judgment and as contemplated in the opinion filed concurrently herewith, be put in operation.

## Opinion on Petitions for Rehearing

BIGGS, Chief Judge

We have imposed a hard task on the State Board of Education of Delaware, on the State Superintendent of Public Instruction, on the other defendants and indeed on the citizens of Delaware for there is a hard task to be done. Adequate education is a duty owed to youth by the community. It is more than this. It is an essential for national survival in the years to come. But the task is not as difficult as the defendants insist. We demonstrated in our opinion of July 19, 1960, that the number of Negro children available for integration in the schools of Delaware is far greater than the number of Negro children who will presently seek integration. In that opinion we pointed to the key fact that only 25 Negro children of approximately the 1,000 available for integration at the first grades, registered for admission at the Fall term 1959. We accentuated the fact that if the same percentage, 2.5%, were applicable to the Negro children seeking integration into all other grades, the number of Negro children seeking integration would be 170, and that even if that number were trebled it would barely exceed 500. See note 2 to that opinion. The petitions for rehearing make no reference whatsoever to this key situation.

### [Not the Task]

The State Board of Education, the State Superintendent of Public Instruction and other defendants persist in their position that to grant the relief sought by the plaintiffs will require the immediate integration of approximately 6813 Negro children into the Delaware school system. This is not the task which is imposed on them under our decision. The primary duty that was placed on the State Board of Education and the State Superintendent of Public Instruction was to create a plan by December 1, 1960 whereby those Negro children who seek integration might achieve that end by the commencement of the Fall term, 1961. The number of Negro children who will seek such integration will be a comparatively small one and their

integration can be accomplished without great difficulty.

As we said in our July 19 opinion the evidence of many of the proponents of the plan approved by the court below seems fraught with unreality. Through the affidavit of Superintendent Miller of June 10, 1959, stated that the number of Negro children who registered for admission at the Fall term 1959 to the first grades as shown by Exhibit No. 11 was 25, we were not informed as to the number of Negro children who were admitted to the first grades at the Fall term 1959. There is nothing in the record which demonstrates the number of Negro children who registered for admission to the first grades at the commencement of the school year 1960. These facts could have been easily supplied to the court below by affidavit and certified to this court even after the appeals were taken. Neither the State Board of Education, the State Superintendent of Public Instruction, nor any of the defendants, insofar as the record shows, have attempted by conducting a registration or by any other means, to bring upon the record the very pertinent fact as to the number of Negro children who actually presently seek integration into grades of the public school system of Delaware. We think that the defendants are reluctant to face the facts, to grasp firmly the nettle that the integration of school systems presents in Delaware and elsewhere. The defendants have evolved the minimum state-wide plan and desire to adhere to it. It is indeed a psychologically tempting one but we think that the hazard involved in integrating at the Fall term 1961 all those Negro children who may then seek integration is largely a mental one. It is for these reasons that we will direct the court below to order the State Board of Education and the State Superintendent of Public Instruction to prepare a plan which will provide for the integration at the Fall term 1961 of all Negro school children who then seek integration. Such a plan can be effective, of course, only if it be worked out with the aid of the Local Boards. Such aid must be forthcoming or it will be required by order of court. But as we pointed out in our



original opinion in these cases, 256 F.2d 688, 693 (1958), it is the duty of the State Board of Education to maintain a "uniform, equal and effective system of public schools throughout the State . . .", 14 Del. C. Section 141. It follows that the primary responsibility for the preparation of the plan which will be required by our judgments must rest on the members of the State Board of Public Education and the State Superintendent of Public Instruction. This is the reason why that primary duty is imposed on them by our decision.

[*More Will Seek Integration*]

It is obvious that in the years to come more and more Negro children will seek integration into the public schools of Delaware and that this desire must be implemented in accordance with the decisions of the Supreme Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955). As time passes and the number of Negro school children seeking integration increases, modifications and enlargements of school facilities will be required. The State Board of Education, the State Superintendent of Public Instruction and the Local Boards can effect such changes and modifications as may be required with the approval of the court below.<sup>1</sup> Eventually a wholly integrated school system will be effected for Delaware: "wholly integrated" in the sense that all school children, whether white or Negro, whose attendance at school is required by law at public schools, 14 Del. C. Section 2702, will attend public schools without regard for race or color.<sup>2</sup> The integration to be provided for by the plan to be submitted to the court below for its approval as its first essential element must provide for the integration of all Negro school children who desire integration at the Fall term 1961. As its second essential element the plan to be submitted must contain adequate provision for the integration of the ever increasing

number of Negro school children who will seek integration in the school years following 1961. This second element of the plan, if it is to be consummated, will necessitate the making of immediate estimates as to future school facilities. The making of such estimates is not a simple matter. Their creation will require the exercise of energy, skill, patience, and creative adaptability by the public school authorities, and, as we have indicated, funds to be appropriated by the General Assembly of Delaware. The duty imposed on the State Board of Education in this respect is as clear as is the responsibility confided to this court and to the court below to make certain that the mandate of the Supreme Court is carried out. If the school authorities do their part and the corresponding duty placed on the people of Delaware by their civic conscience is not met by action of the General Assembly, the public school authorities will at least have the satisfaction of knowing that they have done their duty as the law requires.

[*Different Situation*]

We are aware that strong courts have held in substance that a grade-by-grade integration of the kind approved by the court below has met the criteria laid down by the Supreme Court in its decisions in *Brown v. Board of Education of Topeka*, *supra*. Such a ruling, as some of the petitioners point out, is contained in the decision of the Court of Appeals for the Sixth Circuit in *Kelley v. Board of Education of The City of Nashville*, 270 F.2d 209 (1959), *cert. den.* 361 U.S. 924 (1959).<sup>3</sup> But the all-important issues of integration "with all deliberate speed" and what constitutes a "reasonable start towards full compliance" with the ruling of the Supreme Court as required by its *Brown* decision of May 17, 1954, *supra*, 347 U.S. 483, can be decided properly only on due consideration of all the pertinent factors and circumstances. The first of the circumstances militating against our sanctioning of the plan approved by the court below is, as we have reiterated, that of the 6813 Negro school children shown as available for integration by Exhibit No. 11, only 25, as demonstrated by the record, registered for admission to the first grades for the Fall term 1959. We

1. The court below will retain jurisdiction and any plan approved may be modified by its order from time to time.

2. We point out that there are now in Delaware a sufficient number of public schools, white and Negro to accommodate all the school children of Delaware. Total integration would be possible by using all present schools and employing all present teachers. The reason why such a plan is not presently ordered is because some Negro schools are substantially inferior to corresponding white schools. See the opinion of the Supreme Court of Delaware in *Gebhart v. Belton*, 91 A.2d 137 (1952). See also Article X of the Constitution of Delaware.

3. Denial of *certiorari* by the Supreme Court does not signify approval or disapproval of the decision of the court below. See the opinion of Mr. Justice Frankfurter in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-919 (1950).

point out that assuming that an equal number of Negro school children registered for admission to the first grades for the Fall term 1960, it would follow that less than 1% of the Negro school children available for integration will have been integrated by the Fall term 1960. The fact that the conclusion made by us in our opinion of July 19 as to the number of Negro school children who presently desire integration has not been seriously contravened by those who are in the best position to do so is very significant. The number of Negro school children, who will be admitted to the Delaware public school system by the Fall term 1961<sup>4</sup> under the plan approved by the court below is miniscule. Indeed the number of Negro school children integrated at the end of five years might be as large as 125 or 1.8% of 6813 Negro school children shown as available by Exhibit No. 11. Second, if our conclusion as to the limited number of Negro school children who will seek integration at all grades at the Fall term 1961 is correct and that number will not substantially exceed 500, such full integration could be accomplished without too great difficulty. Third, as we have stated, the plan as approved by the court below will completely deprive the infant plaintiffs, and all those in like position, of any chance whatever of integrated education, their constitutional right. Fourth, the plan approved by the court below goes no further than a grade-by-grade integration beginning at the first grades and can provide integration only for Negro children presently of very tender years, excluding all others. Fifth, the circumstances of *Kelley v. The Board of Education of Nashville, supra*, are not analagous to those at bar. The number of Negro children involved in the Nashville schools was substantially larger than the number with which we are concerned in the cases at bar. Nashville is a city of approximately 173,000 persons, of whom more than 28% are classified as Negroes. Many of the School Districts and High School areas of Delaware with which we are concerned are in rural or semi-rural areas and the number of presently segregated Negro school children involved in the whole of Delaware is much less than the number involved at Nashville. Integration problems are more difficult of solution in heavily populated urban

areas. Moreover the City of Nashville lies in the deep South, a part of our Nation where emotional reactions concerning school integration are more intense than in our own State of Delaware. We think that the Court of Appeals for the Sixth Circuit had this fact in mind when it formulated its decision in the Nashville case. Several United States courts also in the South have ordered grade-by-grade integration of the sort approved by the court below where Boards of Education have taken either no steps toward integration or have made but small advances in that direction.<sup>5</sup>

#### [Judgment Standards]

In short, integration in the State of Delaware, which already has integrated many of its schools, particularly in the Wilmington metropolitan area, should not be viewed, gauged or judged by the more restrictive standards reasonably applicable to communities which have not advanced as far upon the road toward full integration as has Delaware. To apply such standards to the Delaware school system is not permissible in the light of the Supreme Court's mandate that state school systems shall proceed to full integration with all deliberate speed and that each state school system shall make a reasonable start toward full compliance. In *Brown v. School Board of Topeka, supra*, 349 U.S. at p. 300, Mr. Chief Justice Warren stated: "At stake is the personal interest of the plaintiffs [Negro school children] in admission to public schools *as soon as practicable* on a nondiscriminatory basis." (Emphasis added.) The court below and the defendants have overlooked this sentence and the effect which must be attributed to it. We reiterate our opinion that the plan approved by the court below does not meet the standards laid down by the Supreme Court and that the tests of all deliberate speed and a reasonable start toward full compliance, require on consideration of all the circumstances at bar, the formulation of a plan which will provide for the admission to integrated schools at the Fall term 1961 of all Negro school children who seek integration at that time. Such a result in our opinion is the "practicable" one.

4. That number, of course, will comprise the Negro school children newly integrated in the first grades at the Fall term 1960 plus those Negro school children, who, integrated at the Fall term 1959, have been promoted to the second grades in 1961.

5. See for example *Bush v. Orleans Parish School Board No. 3630*, Civil Action, Eastern District of Louisiana, decided without opinion, May 16, 1960; and *Ross v. President of the Board of Trustees of the Houston Independent School District, No. 10,444*, Civil Action, decided without opinion, August 4, 1960.

In so concluding we point out again that we believe that the defendants have acted in good faith but good faith alone cannot solve their problem or our own. True the defendants must act in good faith to comply with the mandate of the Supreme Court, but they must do more than this. They must proceed to integration with all deliberate speed. Certainly in the plan approved by the court below the accent is on deliberation rather than speed. The defendants must also make a reasonable start toward full compliance. In the cases at bar the step toward full compliance about to be compelled is but a small one. It follows that the plan approved by the court below is not in accord with the legal principles enunciated by the Supreme Court. Mixed questions of fact and law are presented and we are free to review them. We conclude that the defendants, acting in their administrative capacities, have failed to exercise properly the discretion confided to them by the law. We are of the view, however, that the abuse of their discretion by the school authorities does not result from bad faith on their part but has come to pass because they have approached this hard problem unrealistically and with too great a degree of caution.

#### *[Nature of Decision]*

It is obvious from the petitions for rehearing that some, at least, of the petitioning-appellees have not grasped the precise nature of our decision. In our opinion of July 19 we did not summarily order full integration of the Delaware School System at the Fall term 1961. We said that we would direct the entry of an order by the court below requiring the State Board of Education and the State Superintendent of Public Instruction to submit to the court below for its approval on or before December 1, 1960, "a modified plan which will provide for full integration of all grades of the public schools of Delaware commencing with the Fall term 1961". We did not state that we would direct the court below to order the interested Local School Boards to cooperate in the formulation of an integration plan. We assumed and we still assume that the court below will dispatch notices to the interested Local Boards calling them into a hearing on the merits of the modified plan when it is submitted. This is what the court below did following the receipt of our mandate based on our opinion handed down in 1958. The modified plan when submitted may or may not

meet with the approval of the court below. It may appear that our conclusion as to the comparatively small number of Negro school children who will seek integration in the various respective grades of the school system of Delaware at the Fall term 1961, is erroneous even though we are presently strongly of the contrary opinion. Such integration, viz., of all Negro school children who seek integration, as indicated would constitute integration at all grades of the public school system of Delaware at the Fall term 1961. But the plan submitted to the court below must go further. It must provide also, if it is to meet with our approval, for a wholly integrated educational system of the kind we have indicated whereby, as the number of Negro school children who seek integrated education increases,<sup>6</sup> the integration of these Negro school children can be effected. We do not and cannot state detailed provisions of the plan. We reiterate that the primary duty to create the plan rests on the State Board of Education and on the State Superintendent of Public Instruction.

#### *[Further Point Raised]*

A further point is raised by one of the petitions for rehearing<sup>7</sup> which also requires clarification. We stated that we would direct the court below to order the individual defendants who are members of the Boards of Trustees or of the Boards of Education in the School Districts, named in the respective titles of these causes, to integrate into the public school system of Delaware, commencing with the Fall term of 1960, the individual infant plaintiffs who shall then actively seek integration. The defendants have construed the words referred to with complete literality. It was not our intention, nor is it our intention now, to exempt the respective individual infant plaintiffs who may presently actively seek integration from the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, provided always that that processing is conducted on a racially non-discriminatory basis. Such processing must, of course, be applied to all children in a well regulated public school system.

6. As it will increase as educational and sociological, as well as economic conditions improve for the Negroes of Delaware.

7. We refer to the petition for rehearing filed by the School Boards of Seaford, Laurel and Milford, and by the Board of Trustees of the Greenwood School.

Another point raised by the same petition for rehearing is not entirely clear to us. The language used seems to suggest that in stating that we desire a plan which will provide for the integration of all grades of the public schools of Delaware we act without authority because in addition to the members of the State Board of Education and the State Superintendent of Public Instruction we have before us as parties defendant on this record only the members of the Local Boards of Trustees or of the Local Boards of Education named in the titles of these cases. It is true that there are many members of Local Boards presently governing segregated or partially segregated schools who are not parties to the instant record but we are not directing the court below to make any order respecting these individuals. But as we have just stated we do have as parties defendant on the present record the members of the State Board of Education and the State Superintendent of Public Instruction and we will, as we have indicated, direct the court below to require these members to prepare a plan of the kind we have indicated. We think that our authority to do this is plain. The problem of integration in

Delaware is not one which can be solved piecemeal. It requires thorough far-seeing over-all treatment by the central school authorities acting with the cooperation of the Local Boards. If a satisfactory modified plan be formulated and submitted to the court below and meets with approval, should the members of the Local Boards involved, not parties to the present record, fail to cooperate in the consummation of the plan, other steps must be taken. We will not assume, however, that there will be a failure of cooperation unless it be made manifest.<sup>8</sup>

In view of the fact that more than a month has elapsed since the handing down of our opinion of July 19 the time for the submission of the plan to the court below is extended to December 31, 1960. The petitions for rehearing will be denied.

Judge Goodrich dissents.

8. We take this occasion to point out, in connection with the foregoing, that the suits at bar are spurious class suits. See *Independence Shares Corp. v. Deckert*, 108 F.2d 51, 55 (3 Cir. 1939), rev'd on other grounds, 311 U.S. 282 (1940), and *National Hairdressers' & C. Ass'n. v. Philad. Co.*, 41 F. Supp. 701, 707-9 (D.C. Del. 1941), aff'd 129 F. 2d 1020 (1942).

## EDUCATION

### Public Schools—Florida

**Karen Renee AUGUSTUS, a minor, etc., v. The BOARD OF PUBLIC INSTRUCTION OF ESCAMBIA COUNTY, etc.**

United States District Court, Northern District, Florida, Pensacola Division, June 23, 1960, September 7, 1960. 185 F.Supp. 450.

**SUMMARY:** Plaintiff, a Negro, filed suit to desegregate the schools of Escambia County, Florida. In addition to the prayers for relief against discriminatory treatment of students, there was a request for an order directing the board to cease assigning teachers, principals and other school personnel on the basis of the race and color of the students attending the school to which the personnel is assigned. Plaintiff argued that this action was supportable on the theory that the children themselves have the right to attend a school system where no decision of the school board is made on considerations of race, and that there is such a community of interest between students and teachers as to give the students the right to bring a class action for teachers not a party thereto. Defendants made a motion to strike all references to non-student personnel from the complaint. The court granted the motion, holding that the *School Segregation Cases* and subsequent interpretations referred only to the segregation of students, and involved no ruling that assignment of teachers, principals and other school personnel on the basis of race or color is a "violation of the equal pro-



tection clause adhering to students." Also, it was held that the standing of the plaintiff was not such as to permit him to include teachers and others in a class action. Subsequently, plaintiff asked for a summary judgment on the complaint and pleadings as amended, but this request was denied.

CARSWELL, J.

#### MEMORANDUM-DECISION

Before the Court is Motion of Defendant Board of Public Instruction of Escambia County, Florida, to strike certain portions of complaint filed by plaintiffs, as a class action invoking the provisions of *Brown v. Board of Education of Topeka*, 347 U.S. 483, and its progeny.

The attack here by the Board was originally twofold, the first being a Motion to Dismiss on the grounds that the complaint showed that plaintiffs had not exhausted their administrative remedies available to them under Florida's Pupil Assignment law.

In view of the holding of the Fifth Circuit in *Manning v. Board of Public Instruction of Hillsborough County, Florida*, Case Number 17939 decided April 18, 1960, defendant here recognizes that its motion to dismiss is untenable in this Court and withdraws it, with preservation in the record of its contention in that regard, alleging inconsistency between the Fifth Circuit in *Manning*, supra, and the Fourth Circuit in *Holt v. Raleigh City Board of Education, N. C.*, 265 F.2d 95.

The remaining Motion to Strike is directed to the portion of the Complaint which seeks Court control by injunction or decree of the assignment of teachers, principals and other school personnel.

In paragraph nine of the complaint plaintiffs allege:

"Plaintiffs, and the members of the class which they represent, are injured by the operation of a biracial school system for the Negro and White children of Escambia County. The biracial school system is predicated on the theory that Negroes are inherently inferior to white persons and, consequently, may not attend the same public schools attended by white children who are superior. The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the

person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior to white teachers, white principals and other white school personnel and, therefore, may not teach white children.

"The injury which plaintiffs and members of their class suffer as a result of the operation of the biracial school system in Escambia County and as a result of the policy of assigning school personnel on the basis of race is irreparable and will continue until enjoined by this court. . . ."

In their prayer for relief, plaintiffs, *inter alia*, seek a decree enjoining defendants, their agents, employees and successors from assigning teachers, principals and other school personnel to the schools of Escambia County on the basis of race and color of the children attending the school to which the personnel is to be assigned.

The defendants move to strike these portions of the complaint, and others of same context, on several grounds, one being that plaintiffs do not have the right to bring such class action in their own behalf affecting the constitutional rights, if any, of others.

#### [Support for Action]

To this plaintiffs argue that such action is supportable under one or the other following precepts: (1) the children themselves have the right to attend a school system where no decision of the school board is based on consideration of race, or (2) there is such community of interest between students and teachers as to give the students the right to bring a class action for teachers not a party herein.

Concerning the first of these contentions plaintiffs say that the Supreme Court has established their right to attend school in a non-racial school system, including, among other things, the assignment of teachers, principals, and other school personnel, quoting, as authority the following language of the first *Brown* case, supra:

"Here, unlike *Sweat v. Painter*, there are findings below that the Negro and white

schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education."

And also, from the second Brown case, 349 U.S. 294:

"Once such a start has been made, the courts may find that *additional time* is necessary to carry out the *ruling* in an effective manner. The burden rests upon the defendants to establish that such *time* is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. *To that end*, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel. . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." (Emphasis added)

Likewise, plaintiffs say, similar language using the words "school system" in *Cooper v. Aaron*, 358 U.S. 1, is also authority.

Plaintiffs further state that the Fifth Circuit made it "abundantly clear" that desegregation of the public schools involves desegregation of the teachers in *Gibson v. Board of Public Instruction of Dade County, Florida*, 272 F.2d 763, wherein it was said:

"At the time of trial, in the Fall of 1958, complete actual segregation of the races, both as to teachers and as to pupils, still prevailed in the public schools of the County."

These specific quotations from the cases cited mean to the plaintiffs that the use of the words "teachers" and "school system" makes it clear that the original school segregation cases involve the whole public school system and that it was the intention of the Supreme Court in those cases to eliminate segregation therein in

all particulars and not merely to permit the individual pupil admission to a public school without consideration of race.

#### [Decided by Inference]

Although the complaint is not in language seeking rights in behalf of teachers, principals or other school personnel, plaintiffs argue that the Brown cases decided by inference that assignment of school personnel, teachers and principals to schools on the basis of race or color is a violation of those persons constitutional rights under the equal protection clauses of the constitution.

No such inferences can be supported by these or any of the other cases called to the attention of the court. The Brown cases hold that the segregation of white and Negro children on the basis of race denies to Negro children equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. The Brown case, 347 U.S. 483 et 487, specifically states that the ". . . minors of the Negro Race . . . seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis." (Emphasis supplied). At page 488 "In each instance they had been denied admission to schools attended by white children. . . ." The Supreme Court held that the doctrine of separate but equal facilities was no longer a valid basis for keeping the races segregated, and rejected the language of *Plessy v. Ferguson*, 163 U.S. 537, as applicable to public education. These holdings, however, cannot be extended as applicable to any other parties than those to the suit and those represented by the parties to the suit who were similarly situated.

The quotation beginning, "Once such a start has been made. . ." from the second Brown case deals with the question of time. The district court may find that additional time is necessary to carry out the "ruling". Since this ruling concerned the admission of students, the quotation beginning with "To that end . . ." refers to the factors which may affect the *length of time* given to the school boards by the district court if such additional time is shown by the school boards to be necessary, to give effect to the Supreme Court's decision.

#### [Statement of Fact]

Even a perfunctory reading of the Gibson case, *supra*, shows that the holding did not pur-

port to affect the assignment of teachers in any way. The quoted portion of the case was merely a statement of fact. That action was brought by Negro children on behalf of other Negro children similarly situated, and on denial of the lower court to grant relief after it found certain portions of the Florida Constitution and statutes to be violative of the Fourteenth Amendment, the plaintiffs appealed. The Fifth Circuit held that the district court should have retained jurisdiction and should review plans for desegregation promulgated by the school board in accordance with the Brown decisions. It also reiterated its holding on a prior case, 246 F.2d 914, involving the same parties with respect to the Florida Pupil Assignment Law.

Plaintiffs admit that the Supreme Court was well advised as to the policies of school boards in selecting teachers, principals and school personnel. Yet no specific holding regarding these different classes of persons was rendered either by the Supreme Court or the Court of Appeals in the foregoing cases. This court cannot indulge in a presumption that these Federal Courts decided the points of law asserted by plaintiff by inference. The judicial power of the Federal Courts under Article III, Section 2, of the United States Constitution extends to the adjudication of cases and controversies. The controversy must be definite and concrete touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Company of Hartford, Conn. v. Haworth*, 300 U.S. 227 at 240 et seq. and the cases cited therein.

The mere mention of the word "teachers" or "administrative personnel" or "school system" in these cases provide neither a legal nor logical basis for their use as authority on the propositions here. These matters were obviously not before the courts and therefore the courts made no ruling thereon.

#### [Action Unsupportable]

This Court finds that under the authorities cited by the plaintiffs, there is no holding to the effect that assignment of teachers, school personnel or principals on the basis of race or color is a violation of the equal protection clause ad-

hering to students as defined by the Supreme Court.

Even if these cases do not provide legal precedent for plaintiffs to bring this action, they argue, such right under the Constitution is, nevertheless, theirs to assert here for they allege that they are suffering irreparable injury by the assignment of teachers, principals, and other school personnel. The logic of such contention is questionable. Students herein can no more complain of injury to themselves of the selection or assignment of teachers than they can bring action to enjoin the assignment to the school of teachers who were too strict or too lenient. It would be an absurdity to say that students in one part of Florida in a county where the salaries of teachers are low could maintain an action against the school board to increase their teachers' salaries to conform to counties in Florida where salaries are higher on the grounds that having lower salaried teachers would deprive the student of equal protection of the laws under the Constitution. This is analogous to the allegations of the complaint here.

Plaintiffs' other contention to the effect that students can raise constitutional rights of others not parties herein finds sanction, they say, in the language of *N.A.A.C.P. v. Alabama*, 357 U.S. 499.

#### [Familiar Doctrine]

Plaintiffs cite the familiar and clear doctrine that one can raise the constitutional rights of another not a party to the suit if "its nexus with them is sufficient to permit that it act as their representative before this Court." See *N.A.A.C.P. v. Alabama*, supra. It seems too obvious for belaboring that no such standard of mutuality can be established between pupils and teachers, between pupils and administrative staff, between pupils and other school personnel.

For the pupils to enjoin the designation, direction and assignment of the teacher, the principal, the administrative staff, the dietician, the janitor, is set forth here as a legal right inherent in the language of the Brown cases interpreting the Constitution; or in the alternative, it is asserted the pupils have legal standing in court to represent these groups in securing for these groups such rights claimed for and in behalf of the teachers and others, none of whom are parties to this suit.

This, in essence, is the thrust of the language of the complaint sought to be stricken. Its effi-

cacy as educational theory, while certainly novel and perhaps subject to some critical disputations by those more expert in the ageless and delicate art of guidance of the young, is not a matter for the taking of testimony in this proceeding. Its assertion here fails—not from such considerations, whether deemed enlightened and salutary or mere nonsense—from the clear lack of any legal sanction.

For these reasons then, all portions of the complaint and prayer concerning teachers, administrative personnel, school system, etc., are stricken by appropriate order in accordance herewith this day.

The duty placed upon the District Courts with reference to admission, without discrimination due to race, of children to public schools is explicit, and this holding here in no way impairs the language of the complaint in regard thereto and to which defendants must reply in accordance with order of this date.

#### ORDER

This cause coming on to be heard on motion of defendants to strike certain portions of complaint, and the same having previously been argued and briefed by counsel for the respective parties, in accordance with Memorandum-Decision filed this date certain portions of the Complaint are stricken as designated below; and counsel for the respective parties being present at this time and motion being made by plaintiffs to require the signing and filing herein of the discovery deposition of William J. Woodham, Superintendent of Public Instruction, one of the defendants, by day certain, and the Court being advised otherwise in the premises, it is, hereby

#### ORDERED:

1. That the following portions of the complaint herein be and the same are hereby stricken:

(a) The following language from paragraph IX:

"The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel

are inferior to white teachers, white principals and other white school personnel and, therefore, may not teach white children."

"... and as a result of the policy of assigning school personnel on the basis of race ...."

The remaining portions of paragraph IX of the complaint are not stricken and are considered by the Court as proper allegations of inducement in support of the remaining portions of the complaint and its prayer.

(b) The following language from the prayer on page seven of the complaint is hereby stricken:

"4. Enter a decree enjoining defendants, their agents, employees and successors from assigning teachers, principals and other school personnel to the schools of Escambia County on the basis of the race and color of the personnel to be assigned and on the basis of the race and color of the children attending the school to which the personnel is to be assigned;"

and the following portion of paragraph 5:

"... the assignment of teachers, principals and other school personnel on a nonracial basis, ..."

2. The defendant superintendent of Public Instruction, of Escambia County, Florida, is hereby directed to sign and file his discovery deposition heretofore taken within ten (10) days of the date of this order.

3. The defendants shall file their responsive pleading to the complaint within twenty (20) days from the date of this order.

DONE AND ORDERED in Chambers at Tallahassee this 23rd day of June 1960.

#### ORDER

This cause coming on to be heard upon motion of plaintiffs for summary judgment, counsel for the respective parties being present and heard thereon, and the Court finding the facts set forth in depositions in support of the complaint insufficient basis for the granting of prayer on such motion, it is, therefore, upon consideration

ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment be and the same is hereby denied.

DONE AND ORDERED in Chambers at Tallahassee this 7th day of September 1960.



## EDUCATION

### Public Schools—Georgia

Vivian CALHOUN v. A. C. LATIMER et al., etc.

United States District Court, Northern District, Georgia, Atlanta Division, September 13, 1960, Civil Action No. 6298.

**SUMMARY:** Atlanta, Georgia, Negro children sought in federal district court to have Atlanta school officials enjoined from operating segregated schools. In a preliminary order before trial, the court took judicial notice of segregated operation of Atlanta public schools, stating that such operation violates the Fourteenth Amendment but that this tentative ruling did not mean that immediate integration would be ordered. After the trial, the court entered its findings of fact and conclusions of law that racial segregation did exist in the operation of Atlanta schools. Defendants were enjoined from further discriminatory practices, and ordered to submit a plan for a start toward desegregation.—F. Supp. —, 4 Race Rel. L. Rep. 576 (1959). The board submitted its plan, to which the plaintiffs objected. At a hearing, certain changes were ordered. After amendment, the plan was approved and a decision on the effective date delayed until May 9, 1960. 5 Race Rel. L. Rep. 56 (1960). On that date, the court entered an order putting the plan into effect on May 1, 1961, looking toward the operation of the session beginning in September, 1961. 5 Race Rel. L. Rep. 374 (1960). On September 13, 1960, the court filed an opinion explaining the year's delay as providing time to allow the people of Georgia "to make a decision in this matter . . . that will prevent the closing of the public schools of Georgia." That opinion follows.

HOOPER, District Judge.

#### OPINION ON PLAINTIFFS' MOTION FOR FURTHER RELIEF

On February 26, 1960 plaintiffs filed a motion, seeking to require defendants to put into operation the Plan heretofore approved by this Court under which the public schools of the City of Atlanta might operate without discrimination. Plaintiffs pray that the Plan become effective in September, 1960. This Court on May 9, 1960 denied such prayers, but decreed that the Plan should be effective in September, 1961.

At the time of hearing the aforesaid motion the Court made a full explanation of the reasons for the year's delay, stating that such remarks would be edited and filed of record subsequently. This Opinion performs that function.

#### (1) HISTORY OF THIS LITIGATION

When this action was filed the people of Georgia did not seem to consider that it created any immediate threat to Georgia's common schools. The Judges of this Court in the Fall of 1958 passed an Order advising the case would be tried before September, 1959. Not until that time did the people begin to realize that some-

thing must be done. Meetings were held and various organizations formed to meet the problem.

In June, 1959 this Court declared that segregation existed, that it must be terminated, and that the defendant Board of Education should file a Plan toward that end by December, 1959, which was done. After various objections were considered the Plan was approved in its final form on January 18, 1960.

The Court at that time declined to order the Plan effective in September, 1960, reserving such ruling until a Commission, appointed by the Georgia Legislature, in January, 1960, should have an opportunity to make its report, the report being due May 1, 1960. The report was filed on that date and pursuant to previous Order of this Court a hearing was held May 9, 1960. At that time the Plan was ordered to commence in September, 1961, for reasons hereinafter set forth.

(2) Throughout this litigation the Court has held to the opinion that delay in ordering the entire elimination of segregation in the Atlanta Public Schools could be justified only in the event that bona fide efforts were being made to eliminate the same under a reasonable and gradual Plan. If no good faith efforts were to be

made to that end nothing could be accomplished by delay.

The Georgia Legislature in January, 1960 did not enact legislation which would allow the Atlanta Public Schools to commence operation under the aforesaid Plan, but left the matter in such status that, under the Georgia laws as they existed, the operation of such Plan in September, 1960 would have meant the closing of the Atlanta Public Schools, with the possible further consequence that all of Georgia's common schools must be closed.

The Legislature at that session, however, did appoint a committee of outstanding Georgians to study the matter and report back May 1, 1960. Some might have thought that the failure of the Legislature in January, 1960 to pass laws permitting operation of the Atlanta Plan should have induced the Court to order the Plan into effect anyway in September, 1960. The Court, however, did not agree. In the first place, such Order of Court could have no effect except to close the Atlanta schools and risk the danger of all of Georgia's schools being closed. In the second place, the Georgia Legislature in January, 1960 had for the most part been elected upon their promises to the people that they would not under any circumstances permit any integration in any school in Georgia, and they felt bound by these promises.

(3) Some may think that the appointment of the Study Commission by the Legislature had no other purpose than to obtain a year's delay. As to that this Court cannot say. However, the Court thinks the appointment of the Commission was a wise step and that much progress has resulted therefrom. Hearings were held in every Congressional District in Georgia, many witnesses were heard, and the purposes of the study and the situation faced by Georgia, were carefully explained to the people of Georgia by the able chairman of the Commission, Honorable John A. Sibley, an outstanding attorney and banker of this state. It was reported that numerically three out of five of the witnesses favored maintaining segregation, even though it might result in abolishing the Georgia public school system. That fact alone, however, shows a decided shift in public opinion in Georgia. This Court is confident that, except for the education of the people by such Commission, the vote would have been overwhelmingly against any integration, whatever the consequences.

This Court on May 9, 1960 therefore, had the feeling that the best interests of Georgia would be served by permitting a new legislature to be elected, with full knowledge by most of our people as to the real issues involved, and the possible disastrous consequences which could flow from the failure of the Georgia Legislature to permit the Atlanta Plan to become effective.

(4) It now seems clear that the people of Atlanta and Fulton County would prefer to have said Plan put into operation, than to have Atlanta's schools closed. It is quite evident that many other populous centers in Georgia have the same feeling. This feeling is not shared by citizens living in the rural areas for two reasons. First, they do not have the residential patterns that exist in the cities, which patterns as formerly pointed out by this Court, would result in the schools located in the white areas being practically all white and those located in negro areas to consist almost altogether, if not totally, of negroes. Such a situation, coupled with a Pupil Assignment Plan on application of the students, would cause little mixing. The residential patterns in the country, however, would not give this advantage. Second, the people in our rural areas have the feeling that if any integration is permitted in Atlanta, or other city in Georgia, it will be but a beginning which will in time spread to their areas.

The danger which Georgia faces in the event that representatives of the rural communities will not permit the Atlanta Plan to become operative, is clearly and forcefully brought out by the report of the Legislative Committee, sometimes called the Sibley Committee in honor of its distinguished chairman. The report pointed out that under a similar situation in Virginia a three-judge court ruled that "no one public school or grade in Virginia may be closed to avoid the effect of the law of the land, as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers." See *James vs. Almond*, 170 F.S., 331.<sup>1</sup>

1. On August 27, 1960 a three-judge Federal Court in New Orleans, in the case of *Bush vs. Orleans Parish School Board, et al.*, declared invalid a Louisiana statute which gave the Governor the right to close any school in the state ordered to integrate. The Court also enjoined the Treasurer of the State and all persons acting in concert with him from enforcing any Louisiana statute which would deny school funds of any kind to any public school in the State of Louisiana because such school has been desegregated.

(5) This Legislative Committee recommended five specific statutes or resolutions to be passed by the General Assembly in 1961. Recommendation No. 1 and Recommendation No. 2 pertain to constitutional amendments, which if proposed to the people in January, 1961 cannot be voted upon until the general election in November, 1962, after the schools have commenced in September.

Recommendation No. 5 however, reads as follows:

"That the General Assembly consider whether, in view of the urgency created by the Atlanta case and other cases which may be brought, it will propose to close the public schools in order to maintain total segregation throughout the state or whether it will choose a course designed to keep the schools open with as much freedom of choice to each parent and community as possible; and, if it chooses the latter course, that it enact legislation enabling each school board or other local body to establish a pupil assignment plan; empowering the people of each community to vote whether to close their schools in the event of integration or to continue the operation of said schools; and enabling each parent to withdraw his child from an integrated school and have the child reassigned to a segregated school or receive a tuition grant or scholarship for private education."

That portion of Recommendation No. 5 suggesting legislation permitting the people of each community to elect as to whether they adopt a Pupil Assignment Plan, or whether they close

their schools, is worthy of careful study. That is to say, should the Legislature permit Atlanta to put into effect in September, 1961 the proposed Plan, the State of Georgia would free itself of the danger which it faces, to-wit, that the closing of the Atlanta schools in September, 1961 would, under application of the principles of law in the Virginia case set forth above, result in the closing of all the public schools in Georgia.

(6) The majority vote of the Legislative Committee makes it clear that the majority of the Committee are opposed to any integration, but they hold the conviction that, since integration is inevitable, it is better to allow each community of the state to decide for itself whether to risk the closing of its schools. The majority report is made by men having the best interests of Georgia's common school system at heart, and includes the Chancellor of the University System and the Superintendent of Schools of Georgia. It also includes the Chairman of the Board of Regents of Georgia, and other outstanding Georgians.

(7) This Court wishes to make it clear that the Court has no desire to meddle into the affairs of the Georgia Legislature or the State of Georgia, but is making a sincere effort to enable the people of Georgia and its legislature to make a decision in this matter, if they so desire, that will prevent the closing of the schools of Georgia. This is a matter of grave concern to the people of Georgia and in particular, to the parents having children of school age but not having sufficient funds with which to provide a private school for their children.

This the 8th day of September, 1960.

## EDUCATION

### Public Schools—Louisiana

Priscilla ANGEL, et al. v. LOUISIANA STATE BOARD OF EDUCATION, et al.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, May 24, 1960, Civil Action No. 1658.

**SUMMARY:** In a class action by Negroes against the Louisiana State Board of Education, a federal district court granted plaintiffs' motion for summary judgment, enjoining defendants from continuing to enforce a policy of excluding plaintiffs and other qualified Negro students solely because of race and color from trade schools in certain designated parishes.

### ORDER

This cause came on for hearing on the 29th day of April, 1960, upon the plaintiffs' Motion for Summary Judgment and the Court being of the opinion that a summary judgment should be granted, it is now Ordered:

That the defendants, and each of them, their agents, employees, successors in office and all persons in active concert and participation with them, be, and they hereby are, enjoined from continuing to enforce a policy, practice, custom

and usage of excluding plaintiffs and other qualified Negro students from the following trade schools, solely because of their race and color: Southwest Louisiana Trades School at Crowley, Arcadia Parish, La., the Natchitoches Trade School at Natchitoches, Natchitoches Parish, La., the St. Helena Parish Trade School at Greenberg, St. Helena Parish, La., Sowela Vocational-Technical School at Lake Charles, Calcasieu Parish, La., and the T. H. Harris Trade School at Opelousas, St. Landry Parish, La.

This 24th day of May, 1960.

## EDUCATION

### Public Schools—Louisiana

Clifford Eugene DAVIS, Jr., et al. v. EAST BATON ROUGE PARISH SCHOOL BOARD, and Lloyd Funchess, as Superintendent of Public Schools.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, April 28, 1960, May 24, 1960, No. 1662-Civil Action.

**SUMMARY:** In a class action, filed in 1956 by Negro children against school officials of East Baton Rouge Parish, Louisiana, a federal district court in April, 1960, granted plaintiffs' motion for summary judgment and in May, 1960, entered a judgment enjoining defendants from requiring racial segregation in public schools and from engaging in action against Negro children therein on the basis of race and color, "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." The court retained jurisdiction to enter further orders or to grant further relief such as might be necessary to bring about compliance with its decree.

WRIGHT, District Judge.

This cause came on at a former day, to be heard on the motion of plaintiffs for summary judgment; on motion of defendants for an Order to join the National Association for the Advancement of Colored People, Louisiana branch, as an indispensable party to this action; on the motion of defendants for more definite statement, and on motions of defendants to dismiss this action, and on the petition of Robert O. McCraine, Sr., et al, to intervene as defendants herein; and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, after due consideration thereof;

IT IS ORDERED by the Court that the motion of plaintiffs, for summary judgment herein, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED by the Court that the motion of defendants, for an Order to join the National Association for the Advancement of Colored People, Louisiana branch, as an indispensable party to this action, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the motion of defendants, for more definite statement, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the motions of defendants, to dismiss this action, be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED by the Court



that the petition of Robert O. McCraine, Sr., et al, to intervene as defendants herein, be, and the same is hereby DENIED.

#### JUDGMENT

This cause having come on for hearing on the 29th day of April, 1960, on plaintiffs' motion for summary judgment, and the court being of the opinion that the motion for summary judgment should be granted,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant East Baton Rouge Parish School Board, its agents, its servants, its employees and successors in office, and those acting in concert with them, be, and they are hereby, restrained and enjoined from requiring

segregation of the races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any other negro child similarly situated in schools under defendants' jurisdiction, on the basis of race and color, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U.S. 294.

This court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree.

## EDUCATION

### Public Schools—Louisiana

Lawrence HALL, et al. v. ST. HELENA PARISH SCHOOL BOARD, and J. L. Meadows, Superintendent.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, April 28, 1960, May 24, 1960, No. 1068 Civil Action.

**SUMMARY:** In a class action filed in 1951 by Negro children against school officials of St. Helena Parish, Louisiana, a federal district court in April, 1960, granted plaintiffs' motion for summary judgment and in May, 1960, entered a judgment enjoining defendants from requiring racial segregation in public schools and from engaging in action against Negro children therein on the basis of race and color, "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." The court retained jurisdiction to enter further orders or to grant further relief such as might be necessary to bring about compliance with its decree.

WRIGHT, District Judge.

This cause came on at a former day, for hearing on the motion of plaintiffs for summary judgment herein, as well as on the motion of Carl Harvin and Catherine Harvin, etc., et al., to intervene as defendants in this action, and on the motion of defendants to dismiss, and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, after due consideration thereof;

IT IS ORDERED by the Court that the motion of plaintiffs for summary judgment herein, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED by the Court that the motion of Carl Harvin and Catherine Harvin, etc., et al., to intervene as defendants, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the motion of the defendants, to dismiss this action, be, and the same is hereby DENIED.

J. S. W.

#### JUDGMENT

This cause having come on for hearing on the 29th day of April, 1960, on plaintiffs' motion for summary judgment, and the court being of

the opinion that the motion for summary judgment should be granted,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant St. Helena Parish School Board, its agents, its servants, its employees and successors in office, and those acting in concert with them, be, and they are hereby, restrained and enjoined from requiring segregation of the races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any

other negro child similarly situated in schools under defendants' jurisdiction, on the basis of race and color, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U.S. 294.

This court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree.

## EDUCATION

### Public Schools—Louisiana

#### ORLEANS PARISH SCHOOL BOARD v. Earl Benjamin BUSH et al.

United States Court of Appeals for the Fifth Circuit, June 2, 1960, CA 3630.

#### Earl Benjamin BUSH v. ORLEANS PARISH SCHOOL BOARD.

Harry K. WILLIAMS et al. v. Jimmie H. DAVIS, Governor, etc.

United States District Court, Eastern District, Louisiana, New Orleans Division, August 29, 1960, 187 F.Supp. 42.

#### STATE of Louisiana v. ORLEANS PARISH SCHOOL BOARD.

Civil District Court for the Parish of Orleans, July 29, 1960, No. 382, 646, Division "A" Docket 5.

**SUMMARY:** Negro children brought a class action in federal district court against the school board seeking injunctive and declaratory relief as to their right to be admitted to Orleans Parish, Louisiana, public schools without regard to race. State school segregation laws were declared unconstitutional and a preliminary injunction was issued requiring desegregation. 138 F. Supp. 336 and 337; 1 Race Rel. L. Rep. 305 and 306 (1956). For other developments in this case see 1 Race Rel. L. Rep. 643 (1956); 2 Race Rel. L. Rep. 308 and 778 (1957); 3 Race Rel. L. Rep. 171 and 424 (1958). Subsequently, the board moved to vacate the preliminary injunction and to dismiss the case on the ground that it was not a proper party defendant, because of a 1956 statute [1 Race Rel. L. Rep. 927 (1956)] transferring the board's control of classification of public schools to a state agency. The motion was denied, the court declaring the statute to be a legal artifice contrived to circumvent the ruling of the *School Segregation Cases* and, therefore, unconstitutional on its face. 163 F.Supp. 701, 3 Race Rel. L. Rep. 649 (E.E. La. 1958). The injunction against the board was thereupon made permanent. On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment, holding the constitutionality of the 1956 statute to be immaterial because it had left the operation of the parish schools with the parish board, which therefore was properly subject to the injunction restraining it from segregated operation. On petition for rehearing, the court held that the principle of federal court abstention did not apply because it was unnecessary here to construe state laws, it being beyond the power of any state law to make permissible the segregated operation of public schools by de-

pendant, 268 F.2d 78, 4 Race Rel. L. Rep. 581 (5th Cir. 1959). Subsequently, the district court ordered the school board to present a plan by March 1, 1960, this date later being changed to May 16, 1960. 4 Race Rel. L. Rep. 581 (E.D. La. 1959). Thereafter, in another case, the state court of appeal held that by the 1956 statute the state legislature had reserved to itself the sole power to classify, in any city of more than 300,000 population, schools other than all white or all Negro—i.e., mixed or integrated. *State v. Orleans Parish School Board*, 118 So.2d 471, 5 Race Rel. L. Rep. 375 (La. App. 1960). Consequently, on May 16, 1960, the board advised the federal district court that it had not prepared an integration plan because it did not believe it had the right to do so under the 1956 statute. On the same date, that court ordered that beginning with the opening of schools in September, 1960, all public schools in New Orleans were to be desegregated according to a plan whereby all children entering the first grade may attend either the formerly all-white public school nearest their homes or the formerly all-Negro public school nearest their homes, and children may be transferred from one school to another if the transfer is not on the basis of race. —F. Supp.—, 5 Race Rel. L. Rep. 378 (1960). The school board asked for a stay of this order, which the Court of Appeals for the Fifth Circuit denied on June 2, 1960. The Attorney General of Louisiana then moved that the state court enjoin the school board from reclassifying Negro and non-Negro public schools. The court granted the injunction, holding that the federal court action was merely an in personam judgment, and therefore no obstruction to a subsequent action in another jurisdiction. The court held that the Act which permits the governor to intercede in school reclassifications was constitutional (Act 496 of 1960, 5 Race Rel. L. Rep. 862 *infra*). On August 18 the governor announced he was taking over administration of Orleans Parish schools and one day later the attorney general released an "open letter to the state" setting forth the legal basis for the governor's actions. Negro plaintiffs in the federal suit then asked a three-judge federal court to enjoin the governor, the attorney general, the state judge, the Orleans Parish school board and its superintendent from enforcing or acting under the state injunction. The prayer alleged the unconstitutionality of the action which the state injunction ordered, and alleged a conflict with the injunction issued in the federal court directing the school board to proceed with desegregation. The court granted the injunction, holding Act 496 invalid on its face, in that it empowers the legislature to decide whether a public school shall be desegregated or not and authorizes the governor to operate schools on a desegregated basis. Also held invalid were Act 256 of 1958, 3 Race Rel. L. Rep. 778 (1958) (right to close any school ordered integrated); Act 495 of 1960, 5 Race Rel. L. Rep. 861, *infra*, (right to close all schools if one integrated); Act 542 of 1960, 5 Race Rel. L. Rep. 864, *infra*, (right to close schools for specified reasons); Act 333 of 1960, 5 Race Rel. L. Rep. 857, *infra*, (no textbooks for integrated schools); Act 555 of 1954, 1 Race Rel. L. Rep. 239 (1956) (enforcing segregation through police power), and Act 319 of 1956 (white and Negro schools to be continued). Certain actions of the Louisiana Attorney General at the hearing by the three-judge court resulted in his being cited for contempt. The district court on August 31 issued an order staying its previous order until November 14, 1960. These developments are reproduced below in chronological order, beginning with the refusal to issue a stay order of June 2, 1960.

[The United States Supreme Court denied an application for a stay of the temporary injunctions and the motion to vacate the order of the district court on September 1, 1960. See 5 Race Rel. L. Rep. 613, *supra*.]

Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

## Refusal to Stay, Fifth Circuit, June 2, 1960

Per Curiam:

The motion filed by Appellant on May 31, 1960 praying a stay of the order entered by the

Honorable J. Skelly Wright, the trial judge, on the 16th day of May, 1960, having been fully considered the same is hereby denied.

### Dissent

CAMERON, Circuit Judge, Dissenting:

In dissenting from the order of this Court denying the motion of Orleans Parish School Board to stay pending appeal the enforcement of the order of the district court of May 11, 1960, I feel constrained to outline briefly my reasons. The order of the district court provides:

"IT IS ORDERED that beginning with the opening of school in September, 1960, all public schools in the City of New Orleans shall be desegregated in accordance with the following plan:

- A. All children entering the first grade may attend either the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.
- B. Children may be transferred from one school to another, provided such transfers are not based on consideration of race."<sup>1</sup>

The motion for stay presented to us recites that the Board's appeal from the order of the district court involves that court's denial of its motion to vacate the court's order requiring it to present a plan of integration in connection with which denial the district court, acting through a single judge and not in conformity with the statutes providing for three-judge courts, 28 U.S.C. §2281, ruled that a statute of the State of Louisiana, Act 319 of 1956, under which the School Board was making the request, was unconstitutional as being in violation of the Fourteenth Amendment of the Constitution of the United States. The motion further avers that application for stay had been made to and denied by the district court, averring further that the appeal presented serious and substantial questions of law upon which this Court should be permitted to pass, and that irreparable injury would result to appellant, to

the citizens of New Orleans and possibly to all the citizens of the State of Louisiana if said order should be enforced. I am of the clear opinion that the order is of doubtful validity and that the circumstances set forth in the motion for stay require that its enforcement be held in abeyance until the appeal can be reached in due course by this Court.<sup>2</sup>

#### I.

There are several reasons why the order appealed from may by this Court be found to be invalid. It involves, in a vital respect, the lives of eleven thousand twenty-four school children and their parents, marking a radical departure from the conditions under which they have, up to now, lived their lives. And it inevitably involves the community at large.

The Supreme Court in the series of Segregation Cases held that wide discretion was reposed in the district courts,<sup>3</sup> and emphasized that such courts were to conduct hearings to determine conditions prevailing at the time their orders should be entered. And by Rule 52(a), F.R.C.P. it is provided: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law *which constitute the grounds of its action.*" [Emphasis added.] The order appealed from here was entered without the hearing of any evidence at all. There was nothing before the court upon which it could base its order, except its own knowledge or "what it read in the papers." The requirement that the district court make findings of fact and conclusions of law was inserted so that the appellate courts could test whether the discretion vested in the district courts had been properly exercised.

It is settled in this Circuit that segregation as such is not condemned and that integration

1. This order was preceded by the recital "It appearing that on February 15, 1956, the defendant herein was ordered to desegregate the public schools in the Parish of Orleans with all deliberate speed; it appearing further that on July 15, 1959 the defendant herein was ordered to file a plan of desegregation by March 1, 1960; it appearing further that on October 9, 1959 the time for filing the plan was extended to May 16, 1960; it appearing further that on this date, May 16, 1960, the defendant has failed to file a plan."

This recital and the quotation in the text constitute the entire order of the district court.

2. Our power and duty to act in the premises is without doubt.

"The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered." Rule 62(g), F.R.C.P.

3. Cf. first Brown opinion, 347 U.S. at p. 495, and second Brown decision, 349 U.S. at 300.



is not required by the Fourteenth Amendment.<sup>4</sup> Its prohibition is against state action depriving "any person" of life, liberty or property without due process of law and denial "to any person" the equal protection of the laws.

The district court did not have before it any proof that any person included in the group to which the order was made to apply had been denied the equal protection of the laws. It simply ordered that the public schools in the City of New Orleans "shall be desegregated in accordance with the following plan." It thereupon sought to deal with a group of children, which we find from an affidavit attached to the motion for stay presented to us, included six thousand nine hundred eighty-two Negro children and four thousand forty-two white children. It gave each of said children the right to attend the school nearest his or her home. The showing before us, but not before the district court, was that, in the last school year, a large percentage of children, both Negro and white, were not assigned to schools nearest their respective homes, but to the nearest school which was able to accommodate them, this being necessary because of the crowded conditions existing in both white and Negro schools.

Under these conditions it is, it seems to me, manifest that, if any considerable number of the six thousand nine hundred eighty-two Negro children should demand entrance into "the formerly all white public school nearest their homes," nothing but chaos could result and the enforcement of the order would be accompanied by nothing but harm to the children, the parents and the teachers of both races and to the entire community. I think it exceedingly doubtful if the court below had the power, of its own motion and without calling witnesses before it, to give it some knowledge of the situation, to enter an order of such breadth and scope amounting in reality to an order for a sort of scrambled or pell-mell integration.

## II.

I am also exceedingly doubtful of the power of the court below to declare Article 319 of the Laws of Louisiana of 1956, RS 17:344, uncon-

stitutional in the course of conducting the proceedings which led to the entry of the order before us. The Orleans School Board had, by proper pleadings, brought this state statute before the court below contending that, under it, the Legislature of the State of Louisiana had been given jurisdiction of the school matters involved in the suit, to the exclusion of the School Board. If the authority of the School Board to act in the matter before the court had been taken away from the Board and had been vested in the legislature, the court had no right to enter the order it did enter without first striking down the Louisiana Statute. According to the application before us and the exhibits, the court below did this by declaring the Act unconstitutional. This, it seems to me, the district court had no right to do.

The last time such an action has been taken with the sanction of the Supreme Court was when, in 1908,<sup>5</sup> the Attorney General of Minnesota was convicted of contempt of court for violating an order of a United States District Court of that state striking down a Minnesota statute. In his dissenting opinion in that case, Mr. Justice Harlan used this language quoted in *Florida v. Jacobson*, infra: "We have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign state from proceeding to enforce the laws of the state passed by the legislature of his own state, and thereby suspending for a time the laws of the state. . . ."

To correct the situation brought about by the *Young* case, the Congress in 1910 passed the statutes which now are 28 U.S.C.A. §§ 2281-2284, providing that attacks upon state statutes on the ground that they violate the Federal Constitution must be heard by a three-judge court. What the judge below did in this case is in line with a practice sporadically observed in this Circuit in recent years in Segregation Cases.<sup>6</sup> But all doubt concerning the legality of such a practice has been removed by the recent decision of the Supreme Court in *Florida Lime*

4. E.g., in *Avery v. Wichita Falls Independent School District*, 1957, 241 F.2d 230, 234, we quoted these words from the decision of a three-judge court in South Carolina in *Briggs v. Elliott*, 132 F.Supp. 776, 777: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

5. Ex parte *Young*, 209 U.S. 123.

6. A practice which I think, and have always thought, is in direct violation of the above mentioned statutes and of the Supreme Court's decisions applying them. See Board of Supervisors of Louisiana State University, etc. v. Alexander P. Tureaud, Jr., et al. 5 Cir., 1955, 225 F.2d 434, dissenting opinion beginning on page 435; same case upon rehearing, 1955, 226 F.2d 714; same case upon further rehearing, 1956, 228 F.2d 895, dissenting opinion p. 896, et seq.

& Avocada Growers, Inc. et al v. Jacobson, Director, etc., Mar. 7, 1960, —U.S.—, 28 L.W. 4165, et seq. The Court quoted from an opinion by Mr. Chief Justice Taft<sup>7</sup> these words:

"The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible or necessary conflict between federal and state authority always to be deprecated."

The Court proceeded to a full discussion of the statutes, their history and application, and to indicate that the statutes should be interpreted broadly to insure that a single federal judge should not offend state authorities by any ruling in the course of a trial which adjudicated that a state statute was in contravention of the Federal

Constitution.<sup>8</sup> Certainly it is apparent that the judge below, acting by himself, did just this. Such a short-circuiting of established statutory proceedings was not, in my opinion, permissible and I think that, at very least, the question thus raised is a substantial one.

Being of the opinion that the action of the court below is not, on the showing before us, sustainable and that the challenge made by the appeal is probably substantial and in good faith, I think it is our duty to stay the execution of the order until we can pass upon the appeal. I therefore dissent from the contrary action by the majority.

8. In *Florida Lime v. Jacobson*, supra, a dissenting opinion written by Mr. Justice Frankfurter and concurred in by Mr. Justice Douglas, makes a plea for procedures not unlike those followed by the court below, the main thrust of the dissent being epitomized in these words (28 L.W. 4173):

"Because these things are true I am convinced that it would in no wise show a disregard for any legislative purpose in the enactment of the three-judge device, . . . if now upon full consideration we were to construe this legislation in the light of the demands of the federal system as a totality to restrict it to what was plainly the central concern of Congress, to-wit, to those cases where state legislation is challenged *simpliciter* as directly offensive to some specific provision of the Constitution and where the claim is not entangled with other claims, usually turning upon the construction of local or federal statutes, which necessarily must be passed upon before the constitutional question is reached."

7. *Cumberland, etc. Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 216.

## State Court Injunction, July 29, 1960

STATE of Louisiana v. ORLEANS PARISH SCHOOL BOARD, et al.

### ORDER

When, after hearing the pleadings, and argument of counsel, and for the written reasons herein filed and made part of the record; IT IS ORDERED, ADJUDGED AND DECREED that the said rule be made absolute, and accordingly, that a preliminary writ of injunction issue herein, restraining, enjoining and prohibiting the defendants, the Orleans Parish School Board, and its members, Emile A. Wagner, Jr., Theodore H. Shephard, Jr., Matthew R. Sutherland, Lloyd J. Rittiner, and Louis G. Riecke, their agents, employees, and all other persons, firms or corporations acting or claiming to act in their behalf, from doing any acts whatsoever towards the re-classification of negro and non-negro public schools in the Parish of Orleans

either by affirmative or negative action on their part.

JUDGMENT, READ, RENDERED AND SIGNED IN OPEN COURT ON JULY 29, 1960.

CARRIERE, J.

### REASONS FOR JUDGMENT STATEMENT

This is a suit by the State of Louisiana seeking to enjoin the Orleans Parish School Board, et al., from doing any act whatsoever towards the reclassification of negro and white students in the public schools in the Parish of Orleans either by affirmative or negative action on their part.

The petitioners invoke as authority for this action Act 319 of 1956 and Act 496 of 1960.

### JURISDICTION

This Court is aware that an injunction has been issued by the Federal District Court for the Eastern District of Louisiana, ordering the Orleans Parish School Board to integrate the public schools of Orleans Parish in a prescribed manner.

The suit under which the Federal Court Order was rendered was an "in personam" action seeking to have the integration of the Public Schools in Orleans Parish. The injunction which was issued by the Federal District Court on May 11, 1960, constituted an "in personam" judgment. A "res" has never been involved in this action which is now pending in the Federal Appellate Courts.

The Federal and State Courts have concurrent jurisdiction over all actions which are "in personam". This accepted maxim of the jurisdictional relationship between our two judicial systems was recognized by the United States Supreme Court in *Kline v. Burke Const. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226. Mr. Justice Sutherland, in delivering his opinion held:

"But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. \* \* \*

Also see *Williams—Federal Practice* (2nd

ed., 1927) p. 254 Comity—as between State and Federal Courts.

The State Court must, therefore, entertain this action in which the State of Louisiana seeks to enjoin the Orleans Parish School Board from doing any act whatsoever towards reclassification of negro and white students in the public schools in the Parish of Orleans. This action like the action pending in Federal Court is "in personam" in its nature.

The true rule deduced is that where a suit is strictly "in personam" in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the Court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each Court acts in accordance with law. Of course the above is subject to the proper application of the principles of *res judicata*.

### CONSTITUTIONALITY OF ACT 496 OF 1960

This Act transfers the power of classifying and reclassifying the Public School facilities in all Parish and City School systems in the State of Louisiana to a committee of the Legislature whose actions are subject to confirmation by the legislature of Louisiana at its next regular session. However, the Legislature is given the exclusive right to institute or reclassify schools on an integrated basis.

Thus the Act itself provides the machinery for the integration of the Public Schools of Louisiana. Since the Legislature can act with "all deliberate speed" to admit children to the public schools "on a racially non-discriminatory basis", Act 496 of 1960 satisfies the letter and spirit of the requirements of the doctrine set forth by the United States Supreme Court in the case of *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed., 1083 (1954).

### POSITION OF ORLEANS PARISH SCHOOL BOARD

The order of the United States District Court provides:

"IT IS ORDERED that beginning with the opening of school in September, 1960, all

public schools in the City of New Orleans shall be desegregated in accordance with the following plan:

- a. All children entering the first grades may attend either the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.
- b. Children may be transferred from one school to another, provided such transfers are not based on consideration of race."

If the Civil District Court for the Parish of Orleans grants the relief prayed for in the instant suit the school board will be enjoined from doing any act whatsoever towards the reclassification of negro and white students in the public schools in the Parish of Orleans, either by affirmative or negative action on their part.

It is settled in the United States Court of Appeals for the Fifth Circuit that segregation, as such, is not condemned, and that integration is not required by the Fourteenth Amendment. *Avery v. Wichita Falls Independent School District*, 241 Fed. 2d, 230. Its prohibition is against state action depriving "any person" of life, liberty, or property without due process of law, and denial "to any person" the equal protection of the laws. *In short the United States Constitution does not require integration; it merely forbids discrimination.* Consequently, the Orleans Parish School Board, for example, may decline to open the public schools in New Orleans and violate neither the order of the United States District Court nor the order of the State Court.

The Court does not imply that the above is the only action which the School Board may take or that it is the only course which it may pursue. The Court is merely pointing out that if the Civil District Court grants the judgment prayed for in the instant case, the School Board will not be placed in an impossible situation.

## Statement by Governor, August 17, 1960

In accordance with the provisions of Act 496 of 1960, I, the governor of the state of Louisiana, in my sovereign capacity, do hereby supersede the Orleans parish school board and do hereby take over the executive control, management and administration of all the public schools in the parish of Orleans formerly under the

### THE PROVISIONS OF ACT 496 OF 1960, SECTION 5, READ AS FOLLOWS:

"Section V. Where, prior to the Legislature of the State of Louisiana having classified or reclassified public schools in order to put into operation a plan of racial integration therein, any court shall decree, or prior to the effective date of this Act shall have decreed, as the result of a suit at law or in equity in which the State of Louisiana has not been made or properly made a defendant, that a school board or school boards shall place into operation in the schools under its or their jurisdiction a plan of racial integration, or that the court itself shall place into operation a plan of racial integration, in that event the Governor, in his sovereign capacity, shall supersede such school board or school boards affected by the decree, as of the effective date of said decree, and shall take over in its or their stead the exclusive control, management and administration of the public schools under its or their jurisdiction, on a racially segregated basis until such time as the Legislature shall classify or reclassify schools to place into operation therein a plan of racial integration."

### OPINION

The Court is of the opinion that it has jurisdiction over the subject matter involved and that Act 496 of 1960, upon which the petitioners rely is constitutional.

The writ of preliminary injunction enjoining the defendants from doing any act whatsoever towards the re-classification of negro and non-negro public schools in the Parish of Orleans either by affirmative or negative action on their part will be issued.

jurisdiction of the Orleans parish school board, as of this date.

I do hereby direct that the public schools in the parish of Orleans shall be opened on Sept. 7, 1960.

I do hereby designate James F. Redmond to act on my behalf and as my agent to operate



all of the public schools for the parish of Orleans.

I direct that registration of all new students desiring admission to the public schools of the parish of Orleans be effected in accordance with the following procedure:

A) For students entering the first grade:

Notify by US mail, addressed to Mr. James F. Redmond, 703 Carondelet st., New Orleans, Louisiana, the name of the student seeking registration, school in which registration is sought and school of second choice in which registration is sought, present address, where and when born, number of the birth certificate, exact year of birth, sex and race, mother's maiden name and occupation, father's name and occupation, physician who delivered child, any illnesses. The above notice shall be postmarked on or before 12:00 o'clock midnight, Sept. 2, 1960, and such notice shall be accompanied with a certified copy of the birth certificate of the student and

a vaccination certificate, or evidence of same, of the student.

B) For students entering other than the first grade:

Notify by US Mail, addressed to Mr. James F. Redmond, 703 Carondelet st., New Orleans, Louisiana, the name of the student seeking registration, school in which registration is sought and school of second choice in which registration is sought, present address, where and when born, number of the birth certificate, exact year of birth, sex and race, mother's maiden name and occupation, father's name and occupation, physician who delivered child, any illnesses, and proper evidence of school credits previously attained by the student. The above notice shall be postmarked on or before 12:00 o'clock midnight, Sept. 2, 1960, and such notice shall be accompanied with a certified copy of the birth certificate of the student and a vaccination certificate, or evidence of same, of the student."

## School Board Announcement, August 20, 1960

Classes will begin for new Orleans public schools on Wednesday, Sept. 7, 1960. Pupils will not report to a school prior to Sept. 7, 1960, for any reason.

Registration of Pupils:

1. All pupils who were enrolled in a New Orleans public school during June of 1960 are considered as being registered and will not repeat any registration process. They will report on Wednesday, Sept. 7, 1960, to the district school to which they are assigned.

2. Pupils who completed kindergarten in a New Orleans public school in the 1959-1960 school year are considered registered and will not repeat any registration process.

3. Children who were registered for the 1960-1961 kindergarten session in a New Orleans public school during the spring registration of April 21-22, 1960, are considered as being registered and will not repeat any registration process.

4. Pupils who were enrolled in a New Orleans public school during June of 1960 but who moved into a new school attendance district during the summer are not considered new pupils and will not repeat any registration process.

However, they should report to their new district school on Wednesday, Sept. 7, 1960, where the principal will arrange for an official transfer.

5. Applications for permits to attend a school other than the one located in the residence attendance district will not be considered or acted upon prior to Monday, Oct. 3, 1960. This includes all residence affidavits. In the meantime, pupils shall enroll in the schools of the respective districts or bus areas in which they reside.

6. All other students are considered to be new students and their registration shall be accomplished in compliance with Executive Order No. 1 issued by Gov. Jimmie H. Davis and dated Aug. 17, 1960. The executive order directs that the registration of all new students desiring admission to the public schools of the parish of Orleans shall be effected in accordance with the following procedure:

Notify by U. S. mail addressed to Mr. James F. Redmond, 703 Carondelet st., New Orleans, La., (1) the name of the student seeking registration, (2) school in which registration is sought, (3) school of second choice in which registration is sought, (4) present address, (5) where and when born, (6) number of the birth certificate, (7) exact year of birth, (8) sex, (9) race, (10) mother's maiden name and occupation, (11) father's name and occupation, (12) physician who delivered child, (13) any illness. The above notice shall be postmarked on or before 12 o'clock midnight Sept. 2, 1960. Such

notice shall be accompanied with a certified copy of the birth certificate of the student, a vaccination certificate, or evidence of same, of the student. In addition proper evidence of any school credits previously attained by the student shall accompany the notice.

7. An individual application for registration must be made for each new pupil.

8. New pupils will receive by U. S. mail a postal card notice of assignment which must be presented to the building principal when the pupil reports to school. New pupils are not to report to a school until the postal card notice of assignment is in their possession.

It is absolutely necessary that birth certificates

and vaccination certificates accompany all applications for registration.

Birth certificates may be secured for pupils born within Orleans parish at Room 1 WO4, City Hall.

Birth certificates may be secured for pupils born outside of Orleans parish, but in the state of Louisiana at Room 508, State Office building.

Birth certificates may be secured for pupils born outside of the state of Louisiana by writing to the Bureau of Vital Statistics in the state or country in which they were born.

Vaccinations may be obtained from private physicians, from the city health department, first floor of City Hall, or from the public school medical department, 820 Girod st.

## 'Open Letter' from State Attorney-General

Honorable Jimmie H. Davis, governor of the state of Louisiana, acting in his sovereign capacity, has on August 17, 1960, by executive order No. 1 superseded the Orleans parish school board and taken over in its stead the exclusive control, management and administration of the public schools formerly under its jurisdiction.

The supreme court of the United States on March 17, 1954, decided that enforced racial segregation in the public schools of a state is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education* 347 U.S. 483.

The United States supreme court postponed pending further argument and the formulation of a decree to effectuate this decision until May 31, 1955. *Brown v. Board of Education* 349 U.S. 294.

In the formulation of that decree the United States supreme court recognized that good faith in compliance with the principles declared in its *Brown* decision might in some situations call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in its May 17, 1954, decision.

Under such circumstances the United States supreme court directed that such action be initiated as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed." As of May 31, 1955, the constitution of the state of Louisiana, Article 12, Section 1, provided as follows:

"The educational system of the state shall

consist of all public schools, and all institutions of learning, supported in whole or in part by appropriation of public funds. Separate public schools shall be maintained for the education of white and colored children between the ages of six and 18 years: Provided, that children attaining the age of six within four months after the beginning of any public school term or session, may enter such schools at the beginning of the school term or session and provided, further, that in any parish or municipality the school board may establish the policy that only children attaining the age of five on or before December 31st may enter kindergarten at the beginning of the term or session and only those attaining the age of six on or before December 31st may enter regular school at the beginning of the term or session."

### 1958 AMENDMENT

This constitutional provision until the *Brown* decision was in constitutional accord with the then existing jurisprudence but after the *Brown* decision was possibly subject to federal constitutional attack. In order to remove the possible objectionable provision of this section of our constitution, the people of the State of Louisiana by amendment adopted Nov. 4, 1958, changed Section 1 of Article 12 so as to read:

"The Legislature shall have full authority to make provisions for the education of the school children of this state and/or for an

educational system which shall include all public schools and all institutions of learning operated by state agencies. In this connection, the Legislature may authorize and/or provide financial assistance to students attending private non-sectarian elementary and/or secondary schools in this state, out of any monies or funds presently or hereafter dedicated or devoted to public schools or public education whether by this Constitution or by Statute, anything in this Constitution to the contrary notwithstanding. A non-sectarian school as used herein, shall mean a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church of sectarian body. Children attaining the age of six within four months after the beginning of any public school term or session may enter public schools at the beginning of the school term or session, and kindergartens may be authorized for children between the ages of four and six years, provided that in any parish or municipality the school board may establish the policy that only those attaining the age of five on or before December 31 may enter kindergarten at the beginning of the term or session and only those attaining the age of six on or before December 31 may enter regular public school at the beginning of the term or session."

The people of the state of Louisiana, after the Brown case, adopted this amendment to bring the article of the state constitution in accord with the constitutional principles declared by the Supreme Court of the United States.

#### ['POLITICAL MATTER']

Under Section I, Article 12, Louisiana Constitution 1921 as amended, there is no duty imposed upon the state to provide a public education and therefore it is a political matter as to whether or not a public education will be provided and this matter is not one subject to the jurisdiction of any court.

The United States clearly recognizes this fact and has even provided by statute, Civil Rights Act of 1960, that when a state by official action makes free public education unavailable to children certain procedures are to be employed in providing education for children residing on federal property.

Since the effective date of this constitutional amendment and until, the last regular session of Legislature held this year, no opportunity has been afforded the people of this state through its Legislature to comply with the United States Supreme Court's pronouncement of de-segregation with all deliberate speed. During this past 1960 regular session of Legislature, the people of this state, through their representatives, enacted Act 496 which provides a method by which de-segregation with all deliberate speed can be effected. In fact Act 496 goes far beyond the mandate of the United States Supreme Court in the Brown case which stated that segregation on a basis of discrimination was unconstitutional in that it proposes a method by which integration of the public schools throughout our state can be effected. Section 4 of Act 496 of 1960 provides that the state of Louisiana reserves to itself exclusively through its legislature the right to institute or reclassify schools on a racially integrated basis. Section 3 of Act 496 of 1960 provides for the appointment of a special school classification committee to deal with this problem of desegregation with all deliberate speed. This committee, I am informed, has been appointed and has been functioning.

As the problem of de-segregation is a state-wide problem, proper legal procedures must be set up with which to cope with this problem and the above action by the people of our state, through their legislature, constitutes all deliberate speed within the meaning of the Brown decision.

#### ['MANDATORY' ACTION]

In superseding the Orleans Parish School Board and taking over in its stead the exclusive control, management and administration of the public schools under its jurisdiction, the governor did not perform a discretionary act. His action was not one involving discretion but one which has been made mandatory by Act 496 of 1960 which provides that where any court shall decree or prior to the effective date of this act shall have decreed, as the result of a suit at law or in equity in which the state of Louisiana has not been made or properly made a defendant, that a school board shall place into operation a plan of racial integration, in that event the governor, in his sovereign capacity, shall supersede such school board effected by the decree and take over in its stead the exclusive

control, management and administration of the public schools under its jurisdiction.

The United States District Court on May 16, 1960 issued the following decree:

"IT IS ORDERED that beginning with the opening of school in September, 1960, all public schools in the city of New Orleans shall be desegregated in accordance with the following plan:

"A. All children entering the first grade may attend either the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.

"B. Children may be transferred from one school to another, provided such transfers are not based on consideration of race."

Act 496 of 1960 was emergency legislation and became law on July 9, 1960 upon the governor's approval and signature.

Act 496 clearly and expressly pronounces that the people of this state fully recognize that the desegregation of our public schools is a matter solely for their concern and action and that the manner in which desegregation can be effected is reserved to the people through their legislature.

#### [STATE MADE PARTY]

The state of Louisiana has now been a party to the litigation entitled *Bush Et Al V. Orleans Parish School Board* pending in the United States District Court for the Eastern District of Louisiana. This a paradox in that the state of Louisiana did on November 1, 1955, file a motion in that proceeding to dismiss that action on the ground that in effect a suit against its school board was a suit against the state, concluding that any judgment which might be rendered therein would have the effect of controlling the state's political power and internal policy concerning the regulation and support of public education under its constitution and laws and would direct and regulate the executive authority of the state in the enforcement of its police power to regulate and provide for public education and public health, peace and good order of the state, and would further require the court to supervise the conduct of state officials with regard thereto.

This motion was denied and the Fifth Circuit Court of Appeals on March 1, 1959 affirmed this

denial, declaring the state was not a party to the case. Act 496 of 1960 is valid legislation upon its face and has withstood constitutional challenge and been declared constitutional in the matter and titled *State of Louisiana vs. Orleans Parish School Board* in the Civil District Court for the Parish of Orleans, wherein the court in upholding the constitutionality of Act 496 of 1960 said:

"This act transfers the power of classifying and re-classifying the public school facilities in all parish and city school systems in the state of Louisiana to a committee of this legislature whose actions are subject to confirmation by the legislature of Louisiana at its next regular session. However, the legislature is given the exclusive right to institute or re-classify schools on an integrated basis. Thus the act itself provides the machinery for the integration of public schools of Louisiana. Since the legislature can act with "all deliberate speed" to admit children to the Public Schools on a racially non-discriminatory basis, Act 496 of 1960 satisfies the letter and spirit of the requirements of the Doctrine set forth by the United States Supreme Court of the Case of *Brown v. Board of Education*, 349 U. S. 294, L.Ed., 1083 (1954)."

Consequently the governor is performing a duty made mandatory upon him in his sovereign capacity by a statute enacted by the people of the state of Louisiana through their legislature with this statute having been declared constitutional by our courts.

The people of this state have enacted through their Legislature at the last regular session held this year act 495 authorizing the governor of this state to preserve the peace and promote the interest, safety and happiness of all the people by closing all public schools when any public school or school system is by court order racially integrated in whole or in part. This is an act, the doing of which may be made inevitable. However I have no reason to believe that the governor shall be required to perform it for I sincerely believe that the actions of the people of the sovereign state of Louisiana sincerely reflect that they have acted and are acting with all deliberate speed to effect the transition to school systems operated in accordance with the Constitutional principles set forth by the United



States Supreme Court in *Brown vs. Board of Education* securing the equal protection of the laws enjoined by the Fourteenth Amendment.

The issue is clear and the lines are drawn. The N. A. A. C. P. through the federal government against the sovereign state of Louisiana and her citizens. Can the rights and powers of this state be abolished by the stroke of the pen wherein the state and her people are acting lawfully and in good faith to comply with the doctrine of all deliberate speed?

**['IN ITS STATUS QUO']**

The state proclaims that our educational system be maintained at the present in its status quo as it has been in the past with the sanction of the United States Court and with recognition by that court that such is necessary. The decree of the federal court to integrate this fall has been nullified by the people of this state by enacting legislation pursuant to which the state has acted.

The decree of the federal district court to integrate this fall is on appeal to the Fifth Circuit Court of Appeals and has never been approved upon its merits. The decree itself is impractical and impossible to place into operation. No evidence was considered by the court before this decree was entered, no hearings to consider such evidence were scheduled or provided, no findings of fact or conclusions of law were made by

the court in violation of the Federal Rules of Procedure. There was absolutely nothing before the court upon which it could base an order. There was no proof whatsoever before the court that any plaintiff in this litigation had been denied any legal right. This state and its people will never allow this injustice to be suffered against them. The hearing scheduled for August 26, 1960, I am fully convinced, will be one in which this state may be fully heard and be granted full opportunity to be heard and have rights recognized. The problem presented requires as much patience, understanding, generosity and forbearance on the part of the federal government as does it from the state of Louisiana and her people.

I wish to assure all of the people of this state I will do my duty as your attorney general and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the state of Louisiana from encroachment thereon by the federal government on any branch, department or agency thereof and to resist by all legal means the usurpation by any agency of the federal government or by any organization of rights and powers reserved to the states by the Constitution of the United States particularly Article III., Section 4 of Article IV, and Amendments 9, 10, and 11 of said constitution.

### 3-Judge U. S. Court Opinion of August 27, 1960

**Earl Benjamin BUSH v. ORLEANS PARISH SCHOOL BOARD**  
**Harry K. WILLIAMS v. Jimmie DAVIS, Governor**

These consolidated cases<sup>1</sup> are before the Court at this time on application for a temporary injunction restraining the Governor of Louisiana, her Attorney General and other state officers as well as a state court judge, the members of the Orleans Parish School Board and its superintendent from enforcing, executing, or acting under the authority of a certain Louisiana state court injunction as well as under various statutes passed by her legislature. The basis for the application is the allegation that the state

court injunction, and the statutes, directly or indirectly, require or promote segregation of the races in the Orleans Parish public schools in violation of the equal protection and due process provisions of the Fourteenth Amendment. There is a further allegation that the state court injunction is in the teeth of an injunction previously issued by this Court, sitting with one judge, requiring the Orleans Parish School Board to begin desegregation of the public schools in Orleans Parish in September, 1960.

**[1956 Order]**

On February 15, 1956, this Court, in *Bush* ordered the Orleans Parish School Board to begin desegregation of the public schools in New Orleans with all deliberate speed. When no

1. *Bush v. Orleans Parish School Board*, Civil Action 3630, is a class action brought by Negro parents in behalf of their minor children and others similarly situated.

*Williams v. Jimmie H. Davis, Governor of Louisiana, et al.*, is also a class action brought by white parents in behalf of their minor children and others similarly situated.

action was taken by the Board under that order, this Court ordered the Board to file a desegregation plan by May 16th, 1960. On May 16th, 1960, the Board filed a pleading in the record stating that because of various Louisiana state laws requiring segregation of the races in the public schools, it was unable to file a plan. Whereupon, on the same day, this Court filed its own plan requiring segregation of the Orleans Parish Schools beginning with the first grade in September 1960.<sup>2</sup>

On July 25th, 1960, the Attorney General, in the name of the State of Louisiana, filed a suit in the Civil District Court for the Parish of Orleans against the Orleans Parish School Board praying for an injunction restraining the Board from desegregating the public schools of New Orleans. The basis for this injunction was the allegation that under Section IV of Act 496 of 1960 only the Louisiana Legislature has the right to integrate the public schools. In due course the injunction was issued as prayed for on July 29th, 1960.

On August 16th, 1960, on motion of the plaintiffs in the Bush case, this Court made the Governor of Louisiana and her Attorney General additional parties defendant and set the motion for temporary injunction for hearing August 28th, 1960. On August 17th, 1960, *Williams et al v. Davis, Governor of Louisiana, et al* was filed. Since in the *Williams* case the plaintiffs also asked for a temporary injunction against the Governor<sup>3</sup> of Louisiana and her Attorney General, in addition to other state officials, a state judge, and the Orleans Parish School Board, this Court consolidated the motions for hearing.

#### SECTIONS I, II AND IV OF ACT 496 OF 1960 AND THE STATE COURT INJUNCTION

Sections I and II of the Act provide for separation of public schools for non-Negro and Negro

#### 2. The court order reads

"IT IS ORDERED that beginning with the opening of school in September, 1960, all public schools in the City of New Orleans shall be desegregated in accordance with the following plan:

"A. All children entering the first grade may attend either the formerly all white public school nearest their homes, or the formerly all Negro public school nearest their homes, at their option.

"B. Children may be transferred from one school to another, provided such transfers are not based on consideration of race."

#### 3. The Governor did not appear at the hearing nor was he represented. He was, however, validly served under La. R.S. 13:3471(6). See Rule 4(d) (7) Fed.R.Civ.P.

children. Under Section IV "the State of Louisiana reserves to itself exclusively through its Legislature, the right to institute or reclassify schools on a racially integrated basis." It is Section IV on which the state court relied for its injunction restraining the Orleans Parish School Board from desegregating, stating that this statute "satisfies the letter and spirit of the requirements of the doctrine set forth by the United States Supreme Court in the case of *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed. 1083 (1954)" because "the Legislature can act with 'all deliberate speed' to admit children to the public schools 'on a racially non-discriminatory basis.'" Assuming the Legislature would be so inclined,<sup>4</sup> the statute is still unconstitutional on its face because it gives the Legislature the right to decide whether a public school shall be segregated or not, and the *Brown* case teaches that no one has this right. *Brown v. Board of Education*, 347 U.S. 483. "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron*, 358 U.S. 1, 17.

#### SECTION V OF ACT 496 OF 1960 AND THE ACTION OF THE GOVERNOR

Section V provides that where a school board is under court order to desegregate, "the Governor, in his sovereign capacity, shall supersede such school board \* \* \*, as of the effective date of said decree, and shall take over \* \* \* the exclusive control, management and administration of the public schools \* \* \* on a racially

#### 4. But see Act 333 of 1960, La. R.S. 17:337, passed by the same legislature at the same session, which provides:

"A. No free school books or other school supplies shall be furnished, nor shall any state funds for the operation of school lunch programs, or any other school funds be furnished, or any assistance or recognition be given to any elementary or secondary school in the state of Louisiana which may be racially integrated, or which shall teach white and colored children in the same school, under any circumstances.

"B. Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined or imprisoned in the discretion of the court."

segregated basis until such time as the Legislature shall classify or reclassify schools to place into operation therein a plan of racial integration." The Governor, acting under authority of this statute, has taken over the control of the public schools in New Orleans and, in compliance with the statute, has issued orders to his administrator, the defendant James F. Redmond, Superintendent of the Orleans Parish public schools, to operate them on a segregated basis. This statute is also unconstitutional on its face. It specifically provides that the Governor shall operate the schools on a segregated basis. And, as above stated, not even the Governor can do this. He, like the state legislature and the state judicial officers, is bound by the command of *Brown*. *Cooper v. Aaron*, supra, p. 17.

ACTS 495 AND 542 OF 1960  
AND ACT 256 OF 1958<sup>5</sup>

Act 256 of 1958 gives the Governor the right to close any school in the state ordered to integrate. Act 495 of 1960 gives the Governor the right to close all the schools in the state if one is integrated. And Act 542 of 1960 gives the Governor the right to close any school threatened with violence or disorder. All these acts have as their sole purpose continued segregation in the public schools. They are but additional weapons in the arsenal of the State for the use in the fight on integration. Although the right of the Governor to close schools under Act 542 of 1960 is not in terms predicated on their integration, the purpose of the act is so clear that its purpose speaks louder than its words. See *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, and cases there cited at pages 542-544. This act may be more sophisticated than Act 493 of 1960 and Act 256 of 1958, but it is no less unconstitutional. *Cooper v. Aaron*, supra p. 17.

5. La. R.S. 17:336.

ACT 333 OF 1960, ACT 319  
OF 1956<sup>6</sup> AND  
ACT 555 OF 1954<sup>7</sup>

These acts specifically provide for segregation of the races in the public schools and withhold, under penalty of criminal sanctions, free school books, supplies, lunch, and all state funds from integrated schools. They are, of course, unconstitutional on their face. *Brown v. Board of Education*, supra.

Various other statutes, passed by the Legislature of Louisiana and dealing with this subject generally, are alleged by the plaintiffs to be unconstitutional. Since these statutes are unrelated to this litigation, we neither consider these allegations nor intimate opinion. Ruling was reserved on various motions, made by the defendants during the course of the hearing. This opinion disposes of those motions. Judgment accordingly.

ORDER

On motion of the Orleans Parish School Board and on suggesting to the court (1) that, because of Executive Order No. 1 and a certain state court injunction, it has been impossible for the Board properly to implement this court's order of May 16, 1960, in time for the opening of school on September 8, 1960, and (2) that such implementation can be completed by November 14, 1960;

And the court being impressed with the sincerity and good faith of the Board, each member of which personally appeared, with the exception of member Emile A. Wagner, Jr., who was absent from the city at the time;

IT IS ORDERED that the execution date for the plan of desegregation contained in this court's order of May 16, 1960, be extended to Monday, November 14, 1960, which is the beginning of the second quarter of the school year.

IT IS FURTHER ORDERED that the record show that counsel representing the plaintiffs opposed the motion of the Board.

6. La. R.S. 17:341 et seq.

7. La. R.S. 17:331 et seq.

## Contempt Citation of August 27, 1960

To Jack P. F. Gremillion:

You are hereby cited to appear in the courtroom of the United States district court for the Eastern District of Louisiana at 10 o'clock, a.m.

on Monday, the 12th of September, 1960, at New Orleans, La., and show cause, if any you have, why you should not be adjudged guilty of criminal contempt of court consisting of misbe-

havior in the presence of the court or so near thereto as to obstruct the administration of justice by a three-judge district court for the Eastern District of Louisiana engaged in the hearing of cases styled: Earl Benjamin Bush, et al, plaintiffs, versus Orleans Parish School Board, et al Defendants, Civil Action No. 3630 on the docket of said court, and Henry K. Williams, et al, Plaintiffs, versus Jimmie H. Davis, Governor of the State of Louisiana, et al, Defendants, Civil Action No. 10329 on the docket of said court.

The essential facts constituting the criminal contempt charged occurred on the 26th day of August, 1960, and most of said facts are shown in an excerpt by the court reporter of the proceedings on the trial of said cases, a copy of which is hereto attached and made a part hereof, including the following:

(1) You appeared as an attorney upon the trial of said cases. Upon an adverse ruling of the court, you insulted the judges of said court and in a loud and angry manner shouted, "How can this be fairness and justice, if you are going to come in here and just run roughshod over us?" whereupon, you walked out of the court-

room without requesting permission of the court, and failed to return.

(2) In the presence of the court, not actually heard by the judges, but heard by others, including the public news media, and reported by the court reporter, you referred to the courtroom as a "den of iniquity" and stated in substance, "I am not going to stay in this den of iniquity."

In addition to the misbehavior in the presence of the court, in the corridor or hallway outside of the courtroom, and in the presence of others, including the public news media, and so near to the court as to obstruct the administration of justice, you referred to the court, or to the three judges constituting said court, as a "kangaroo court."

The contempt or contempts charged involved disrespect or criticism of the judges constituting said court and they are thereby disqualified from presiding at the trial or hearing of this contempt citation.

It is further ordered that the United States Attorney for the Eastern District of Louisiana note his appearance herein and prosecute this proceeding.

## Stay Order of August 31, 1960

On motion of the Orleans Parish School Board and on suggesting to the court (1) that, because of Executive Order No. 1 and a certain state court injunction, it has been impossible for the Board properly to implement this court's order of May 16, 1960, in time for the opening of school on September 8, 1960, and (2) that such implementation can be completed by November 14, 1960;

And the court being impressed with the sincerity and good faith of the Board, each member

of which personally appeared, with the exception of member Emile A. Wagner, Jr. who was absent from the city at the time;

IT IS ORDERED that the execution date for the plan of desegregation contained in this court's order of May 16, 1960, be extended to Monday, November 14, 1960, which is the beginning of the second quarter of the school year.

IT IS FURTHER ORDERED that the record show that counsel representing the plaintiffs opposed the motion of the Board.



## EDUCATION Public Schools—Tennessee (Knoxville)

Josephine GOSS, et al. v. THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, et al.

United States District Court, Eastern District, Tennessee, Northern Division, August 19, 1960, 186 F.Supp. 559.

**SUMMARY:** Negro children in Knoxville, Tennessee brought an action in federal court against city officials, asking for desegregation of the schools. One of the complainants asked for an order requiring defendants to submit a complete plan designed to bring about good faith compliance with the decision in the *School Segregation Cases* by providing for a reasonable start of desegregation and a systematic method for completion. The court granted the request, and defendants were ordered to submit such a plan by April 8, 1960. 5 Race Rel. L. Rep. 80 (1960). On that date, defendants offered a proposal for desegregation of one grade a year, with a liberal system of transfers. The court found the plan submitted to be a reasonable start, except that no adequate provisions were made for Negroes to take certain courses in a technical school. The plan was approved, but the board was directed to restudy the problem of technical courses. Subsequently, plaintiffs' motion for a new trial was denied. The court retained jurisdiction.

TAYLOR, District Judge.

### JUDGMENT

This cause came on to be heard on August 8, 9, 10 and 11, 1960, upon the entire record, upon stipulations, oral testimony, depositions and exhibits, without the intervention of a jury, and upon briefs and argument of counsel, pursuant to which the Court on August 19, 1960, filed its Memorandum, all of which are herein incorporated by reference.

It is, therefore, ORDERED, ADJUDGED AND DECREED, as follows:

1. That the Plan of The Board of Education of the City of Knoxville, approved by said Board on April 4, 1960, and presented to this Court on April 8, 1960, be approved with the single exception that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them. The defendant Board of Education of the City of Knoxville, Tennessee is hereby ordered to put said Plan as approved by this Court into effect in accordance with the tenor thereof.

2. That the prayer of the plaintiffs for in-

junctive relief and their motion for preliminary injunction be, and the same hereby are, denied.

3. That the jurisdiction of the action is retained during the period of transition.

To the foregoing actions of the Court, as contained in Paragraphs numbers 1. and 2. hereinabove, the plaintiffs except.

### ORDER

The plaintiffs have filed a motion for a new trial and for appropriate relief from the operation of the judgment entered by the Court in said cause on August 26, 1960.

The Court having examined the motion and attached affidavits and exhibits and having also examined plaintiffs' brief in support of said motion and being of the opinion that it is without merit, it is, therefore, ORDERED that said motion be, and the same hereby is, denied.

### MEMORANDUM

This suit was filed by a number of negro children and their parents or guardians against the Members of the Board of Education of the City of Knoxville, namely, John H. Burkhart, Robert B. Ray, Roy E. Linville, Charles R. Moffett and Mrs. Gilmer H. Keith, and also the Board of Education of the City of Knoxville, the School Superintendent and the persons who were either actual principals or acting principals of East High School, Park Junior High School,

Mountain View Elementary School and Fulton High School in Knoxville, Tennessee, the Supervisor of Child Personnel Department, said defendants being the administrative officers having general supervision and control of the public schools of Knoxville, asking for an injunction restraining defendants from operating a compulsory racially segregated school system in Knoxville and for a declaratory judgment, declaring the rights of plaintiff school children to be admitted to the public schools of Knoxville on a racially unsegregated basis and without discrimination on account of race or color.

The defendants by answer admitted that the public schools were operated on a segregated basis, as had been the practice and custom in the Knoxville area since 1870.

The answer asserted that "Two duties of these defendants, have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted. . ."

#### *[Postponement Argument]*

In short, the position of the Members of the School Board was that the interest of the community demanded postponement of desegregation until a plan could be perfected that would fit the needs of the community.

The suit arises under the Constitution of the United States and seeks the enforcement of rights guaranteed by the Fourteenth Amendment. Jurisdiction is derived from Title 28 U.S.C., Sec. 1343. The Court has jurisdiction of the parties and the subject matter. Title 28 U.S.C. 1331, 2201, 2202.

The action was filed as a class action under Rule 23(a)(3) of the Federal Rules of Civil Procedure.

The parties stipulated many facts, many of which are included below in this memorandum opinion.

Plaintiffs are negroes and are citizens of the United States, State of Tennessee and are resi-

dents of and domiciled in the City of Knoxville, Knox County, Eastern Division of Tennessee. Adult plaintiffs, not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

All infant plaintiffs are attending public schools operated by the City of Knoxville, except that infant plaintiffs, Blake, Robinson, Jr., Riddle and Thompson, graduated from Austin High School on May 31, 1960.

Defendant, Board of Education, operates the public elementary and secondary schools, including those now designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education and use of white children residing in the City of Knoxville. These schools are attended exclusively by white children and admittance thereto was denied to the infant plaintiffs and other negro children similarly situated who reside in the areas proximately surrounding said schools, solely because of their race or color. The defendant, Board of Education, maintains and enforces a policy and practice of compulsory racial segregation throughout the Knoxville School System.

Fulton High School, in addition to providing the usual high school courses, affords adequate facilities to provide technical and vocational instruction on a modern basis by grades. It is used by white children residing in the City of Knoxville, Tennessee who desire and are qualified to take said technical and vocational instruction, irrespective of their place of residence in the City of Knoxville; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire instruction, and other Negro children similarly situated, residing in the City of Knoxville, irrespective of their place of residence in the City of Knoxville, solely on account of their race or color.

#### *[40 Schools in System]*

The School System of Knoxville consists of 40 schools, total enrollment of 22,448 students, of whom 4,786 are Negro students and 17,662 are white students, as at the close of school June, 1960. On that day, the Knoxville School System employed a total of 879 principals and teachers, 712 of whom are white persons and 167 are Negroes.

The enrollment in the first grade of the Knoxville Public School System was approximately

2,314 students, and 2,500 are anticipated in the first grade for the year beginning 1960, of whom approximately 1,900 are anticipated to be white students and 600 Negro students. Teachers employed for the first grade, year 1959-1960 of the Knoxville School System numbered 84, of whom 63 were white persons and 21 were negroes.

Insofar as quality of teaching is concerned, the Public Schools of Knoxville operated for negro students are substantially equal to the Public Schools of Knoxville operated for white students.

There is no difference in the salary schedules of negro teachers and white teachers.

The physical facilities for white and negro students are excellent.

#### *[Petitioned Since 1954]*

Beginning with the year 1954 and continuing from time to time to the filing of the present suit, negro parents and children and other citizens have petitioned the School Board and appeared before the School Board and asked the Board to take immediate action towards desegregation of the Public School System.

On June 16, 1955, the Attorney General of Tennessee rendered an opinion to the State Commissioner of Education, and through him to the Superintendent of Education for the State of Tennessee, in which he stated in substance that under the Tennessee Code it is the responsibility of each local school board to determine for itself the way in which it will meet the problems of desegregating the schools under its jurisdiction. As a result of this opinion, together with the decision of the United States Supreme Court in the Brown Case, the Board in a special meeting held on August 17, 1955 resolved that it would act in good faith to implement the constitutional principles declared in the Brown decision as applied to public schools, and would make a prompt and reasonable start towards those objectives.

The Superintendent and his administrative Staff were instructed to develop a specific plan of action leading to the gradual integration of the Knoxville public schools.

At a special meeting held on August 17, 1955, following the second Brown decision of May 31, 1955, the Board reaffirmed its policy to work towards gradual desegregation.

Two Members of the Board and two Members of the supervisory Staff visited the integrated

public schools of Evansville, Indiana in July, 1955 to study desegregation in those schools.

On August 17, 1955 the Board directed the Superintendent and his Staff to develop a plan of action leading to the gradual integration of the public schools and to that end the Superintendent and his Staff began holding meetings for the purpose of further exploring the subject. As an outgrowth of these meetings, the study council, composed of all principals, school administrators and supervisors (both white and negro) and the Superintendent of Schools, was formed for the purpose of exploring and studying plans and procedures in school desegregation. This study council held an additional series of meetings and formulated several possible plans for desegregation, eight of which were presented to the Board for the Board's study. These study groups continued with their meetings the remainder of 1955 and during the year 1956.

#### *[8 Plans Reviewed]*

In the meeting of May 11, 1956, the Board announced that each of the eight plans for desegregation had been carefully reviewed by the Board but that the Board did not feel at that time that desegregation of the Knoxville public schools could be successfully put into operation. Three reasons were given for such action:

(a) Segregation should not be attempted until the school building program is further advanced.

(b) The Members of the Board do not believe that the people of both races are ready for a definite plan for desegregation and that further delay would lessen the likelihood of unpleasant incidents which have occurred in some places where desegregation has been inaugurated.

(c) Before any plan for desegregation is put into effect, further studies should be made of the subject, and plans further developed that the children of both races will not be handicapped by a radical change in their classroom life.

During the week of August 27, 1956, serious trouble developed in Anderson County, Tennessee in the integration of the Clinton High School. This trouble produced several tense hearings and trials in this Court. In September, 1957, a Nashville, Tennessee elementary school was bombed and severely damaged. On October 5, 1958, Clinton High School in Clinton, Ten-

nessee was bombed causing damage estimated at \$250,000.00 to \$300,000.00.

[Hearing Held]

A hearing was held by this Court on February 8, 1960 on plaintiffs' motion for a preliminary injunction prohibiting the defendants from refusing to admit or transfer the infant plaintiffs to the schools to which they had applied for admittance on account of their race or color and for the declaratory relief sought in the complaint. At this hearing, defendant, Board of Education, agreed that it would submit a plan for desegregation on or before April 8, 1960. Action on other phases of the relief sought in the complaint was postponed, pending the submission of the plan.

On April 8, 1960, the Board filed the following Plan, which is sometimes referred to as Plan Nine:

- "1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.
2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.
3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.
4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.
5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.
6. The following will be regarded as some

of the valid conditions to support requests for transfer:

- a. When a white student would otherwise be required to attend a school previously serving colored students only;
- b. When a colored student would otherwise be required to attend a school previously serving white students only;
- c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

One Board Member voted against the Plan, stating that "what the Board is doing is a mistake."

The Members of the Board are continuously changing, while the Members of the Administrative Staff remain constant. Certain Members of the Board are elected at biennial election and this puts the terms of the Members on a staggered basis.

Plaintiffs filed seven objections to the Plan on April 18, 1960. It is insisted by the plaintiffs in these objections that: (a) The Plan does not provide for elimination of racial segregation "with all deliberate speed" as required by the Fourteenth Amendment to the Constitution; (b) it does not take into account the five years which have elapsed during which the Board has failed and refused to comply with the Fourteenth Amendment; (c) a period of twelve years for the consummation of the Plan is not in the public interest and is not in compliance with the Fourteenth Amendment; (d) the defendants have not carried the burden of proof of showing problems related to public school administration as specified by the Supreme Court in the second decision of *Brown v. Board of Education*, (May 31, 1955), 349 U.S. 294; (e) under the Plan, the infant plaintiffs and all other children attending the public schools of Knoxville in their class will be deprived of their right to attend a desegregated school as guaranteed to them by the Fourteenth Amendment; (f) the Plan deprives infant plaintiffs and those similarly situated from enrolling in Fulton Technical High School and other special vocational schools, summer courses and kindred educational training of a specialized nature as to which enrollment is not based upon residence; and (g) Paragraph 6 of the Plan violates the due process clause of the Fourteenth Amendment in that said paragraph provides racial factors as conditions to support requests to



transfer, and the racial factors are designed and necessarily operate to perpetuate racial segregation.

A trial was held on August 8-11, 1960 on defendants' motion for the adoption of the Plan and plaintiffs' objections thereto. Substantial testimony was introduced during the trial, a material portion of which consisted of the reading of discovery depositions of various individual defendants and of a number of adult plaintiffs.

#### [Controlling Issue]

The controlling issue in the case and to which the greater part of the evidence was directed is:

Is the time delay provided for in the grade a year desegregation proposal reasonably necessary in the public interest and is it "consistent with good faith compliance at the earliest practicable date"? See *Brown v. Board of Education*, supra.

It is the position of the Board that a more accelerated plan for desegregation would cause administrative problems of great magnitude and serious interruption in the operation of the Knoxville School System with resultant deleterious effects upon the school children of both races.

The Board maintains that the grade a year plan is a compliance with the "deliberate speed" concept in the light of the existing conditions in the Knoxville area.

As to the good faith phase of the issue, the Board insists that its Members, the then Superintendent of Schools and the Members of his Staff, began to consider the question of desegregation immediately following the first decision in the *Brown* Case in 1954 but that they withheld efforts to perfect a plan until the second *Brown* decision on May 31, 1955; that following this decision Board meetings and workshop meetings were held by the Board with principals of negro schools and white schools; and that much of the literature on the subject of desegregation was studied with the view of finding a plan that would meet the needs of the Knoxville community and at the same time protect and enforce the constitutional rights of the negro children attending the public schools of Knoxville.

In support of the Plan, Superintendent Johnston testified that he became Superintendent on June 15, 1955 and that on the next day he asked his Administrative Staff to come together to discuss the Supreme Court's decision and steps that ought to be taken to study the best approach to

compliance with the decision; that out of the meeting grew the suggestion that some Members of the Staff and of the Board visit a city with experience in desegregation; and that the City of Evansville, Indiana was chosen because of its comparable size and because it had been operating under a desegregated program since 1949. He testified that two Members of the Board and two Members of the Staff visited the schools in that City and spent a day or more in the schools and with the superintendent.

Subsequently, on July 25, 1955, he inaugurated a program of inviting white principals, Members of the Board and Staff to discuss how best to comply with the Supreme Court's decision. He attempted at the meeting to establish an atmosphere or environment under which these persons would talk freely on the subject.

A week later, they had a similar meeting with the negro principals, Members of the Board and Staff at which exactly the same matters were discussed in an atmosphere under which the negro principals would feel free to ask questions and make suggestions.

He testified that separate meetings were held at his own suggestion with the thought that participants would talk more freely if they met separately and that thereby he could better assess whether there was opposition or a good feeling about the whole business.

#### [Staff Meetings]

At the same time, he inaugurated a series of Staff meetings for a period of an hour a day for 15 successive working days for the exchange of views on the problem.

On January 26, 1956, he testified that they convened a meeting of the negro principals and general supervisors in the central office to determine whether they were willing to participate in a series of meetings to consider the subject of desegregation. A similar meeting with the white principals came a few days afterwards.

On February 1, 1956, a Staff meeting was held to survey the willingness of principals of both groups to join in a study group or workshop. On February 2, 1956, all principals regardless of race were called for a meeting in the central office at which no shyness or reticence to discuss the subject appeared. He commented that for 32 years to his personal knowledge negro principals and white principals had met together in regular meetings.

He testified that a series of workshop meetings

were developed to explore different plans and that out of these meetings there evolved eight suggestions to be submitted to the Board of Education without recommendation which were the result of the studies of the principals of both races and of the Staff.

Subsequently, in January, 1957 at a meeting, he requested the principals of both races and the supervisors to meet with him to further discuss the subject. At that meeting he indicated that he would like personally to come to the schools and sit down with their faculties and talk with the teachers to see how they felt on the subject because he felt that "the burden of making that plan successful . . . would be on the shoulders of the teachers who work closely with children and with parents." Following this meeting, he testified that he started going to schools at the invitation of the principals and that he attended 12 to 15 such faculty meetings. It was his purpose to discover through these informal meetings whether there were members of the faculties who opposed any form of desegregation. He wanted to determine whether there were pockets of resistance or whether a favorable climate for compliance existed among the teachers. These meetings continued through the school year 1957. By Fall, he testified, the invitations seemed to slow down and that he seemed to detect a feeling amongst the negro and white principals which did not exist before. He pointed out that there had been dynamiting and other difficulties around the Knoxville area; and that trouble had arisen in Nashville and Clinton.

#### *[Cause of Reflection]*

Superintendent Johnston stated that violence occasioned by desegregation in neighboring cities caused us to reflect a little more on how it will affect us and made us more conscious of what might happen here. He pointed out that no child could get an education operating under a feeling of fear or tension or emotional unrest and that every day a child loses from its normal educational program is practically gone forever and will never be completely regained; that order is the first law in the classroom and that an educational program must have order if children were going to learn. He said: "We were concerned with that."

At the same time, he noted that the School Board was engaged in an extensive building program which involved both Staff and Board

and which was heavily time consuming; that Board and Staff Members examined blueprints and drawings of the architects minutely and that they made innumerable visits to the buildings when they were under construction and that before a building was accepted it was the duty of the Board to go through it, inspect the rooms, corridors and facilities in the company of the architect and of the representative of the contractor.

This was a massive building program carried out under Bond Referendums of 1946 and 1954 and involved nearly eight million dollars of new construction and remodeling in both white and colored schools.

In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the re-zoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

#### *[Estimates of Children]*

On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of negro citizens; that the zone boundaries were often dictated by artificial barriers like heavily traveled streets and also by the size and capacities of school buildings.

In response to a question that some capacity was preserved at Park Lowry for transfers which were authorized under the Plan, he testified that he had no way of knowing who was going to ask for a transfer and that he only knew that under the Plan white students and negro students would be treated alike.

He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment.

With reference to the fact that eight plans were originally developed for submission to the Board and that the Plan which was finally adopted involved only a grade a year desegregation, he testified that the Plan adopted was based on the experience around us and studies of the general situation of desegregation; that it was felt that this Plan could be introduced in the City of Knoxville with the least disturbance to the over-all educational program; and that it would be accepted by the majority of citizens with less tension and less emotional excitement than any other plans that had been studied.

#### *[Desegregation Not Easy]*

He reiterated that the Knoxville School System had been in existence since 1870 and that desegregation would not be easy; that it was the goal to achieve desegregation and at the same time maintain an orderly decorum or environment under which all children could continue to go to school day by day free from tension and free from fear. He repeated that order is the first rule of a classroom.

In presenting the grade a year plan to the Board, the Staff made seven observations in favor of the plan. The first was that it appeared to meet the requirements of the Supreme Court decision and of the laws of the State which placed the burden or responsibility on local boards for desegregation and for the assignment and placement of students. Second, the Plan did not limit the speed with which it could be implemented. Third, it provided for gradual implementation until the complex problems of zoning, transfer and assignments of students could be adjusted in the light of experience. Fourth, it had the advantage of numerous other plans as a background for its adoption. Fifth, the main features of the Plan have been upheld by higher courts. Sixth, the Plan lessened the opportunity for developing prejudices. Seventh, it minimized the possibility of administrative problems that could be of such complexity and magnitude as to seriously undermine and impair the total educational program of the City.

Finally, he emphasized the adaptability of small children and that they do not have the

prejudices of older children or grown people and could be fitted into the work easier than older children. He felt that the gradual plan would enable the school system to continue a fine educational program with less tension, less fear and less emotional disturbances than a plan which rushed into a broader field of desegregation. He felt that the gradual plan would have the sympathetic understanding of the great majority of the citizens of the City. He pointed out the importance of this in going before the City Council on behalf of school budgets with which to operate the schools; that the School System had to have the sentiment of the people with it because it involves budgets, their attitude towards referendums for new schools and new buildings, etc.

#### *[Not Optional]*

With reference to evidence that there had already been desegregation of ball parks, public libraries, buses and airport restaurants, etc. in and around Knoxville and that this would seem to indicate that a speedier plan of desegregation could be inaugurated, Superintendent Johnston pointed out that under the compulsory attendance law, children are compelled to go to school for a period of seven hours a day and that he knew of no law that compelled them or any adult to go to a ball park, the library or airport restaurants. He pointed out that these were optional matters, but that under the school law children were required to go to school.

In the course of his testimony, Superintendent Johnston testified to certain achievement tests given all children in the sixth grade in the Knoxville schools. His testimony was that as a result of these tests it appeared that the achievement levels of students from white schools were somewhat above the national norm and that the student level from colored schools were substantially below the national norm. This testimony was objected to by the plaintiffs on the ground that the results of the tests were hearsay. The Court recognized this objection, but admitted the testimony for such bearing as it might have on the good faith of the Board in utilizing the grade a year plan.

In his deposition, Superintendent Johnston was asked about the industrial courses given at Austin High School, the colored school, and at Fulton High School, the white technical school. It appeared from his testimony that

Fulton High gives a course in television, a course in advanced electronics, ones in air conditioning, refrigeration, commercial art, commercial photography, distributive education, drafting, machine shop, printing and sheet metal which are not offered at Austin High School. Certain courses, he testified, such as brick masonry, tailoring, etc., are offered at Austin which are not offered at Fulton.

*[Not Admitted to Course]*

Colored students are not admitted to these courses at the present time at Fulton High School because of the segregated schools.

Generally, the testimony of Superintendent Johnston was that the school facilities and teaching level at both the colored and white schools are equal. He pointed out that the colored teachers are paid at the same salary level as those in the white schools and that the work done is equivalent. These facts were also stipulated.

The conclusion the Court draws from this evidence is that students including plaintiffs now in school who would not, if Plan Nine were adopted, be permitted to go to an integrated school, would still have equal opportunities for an education in the fine colored schools with their excellent teaching staffs.

This conclusion is not true of the special technical courses offered at the Fulton High School. Under Plan Nine colored students now in school and desiring those courses would be barred from taking those courses. They would have to complete their scholastic education without the opportunity of taking these courses. Superintendent Johnston testified that he had talked to the teachers in the Fulton High School and they were of the opinion that to admit colored students to these courses would cause trouble and disciplinary problems, an opinion in which he joined.

Nevertheless, the Court feels that despite the great merit of Plan Nine, it is deficient in that it precludes colored students now in school from ever participating in these specialized courses.

Dr. Burkhardt, Chairman of the Board since 1958, was of the opinion that complete desegregation would disrupt the orderly process of education in Knoxville and that the children of both races would be materially affected thereby. This opinion was based in part on the attitude of the great majority of the citizens

of the Knoxville area who feel that the citizenship is not prepared at this time to accept anything except gradual desegregation. He was further of the opinion that complete desegregation would cause violence in the community.

This Court recognizes that the Supreme Court stated in substance in *Cooper v. Aaron*, 358 U. S. 1, that opposition to desegregation was not alone a sufficient reason to postpone desegregation. But, the Court also stated in substance in *Brown v. Board of Education*, 347 U. S. 483 that one of the factors that the trial court should consider in resolving the question of immediate and complete desegregation or gradual and complete desegregation is the interest of the people who are affected in the community.

Dr. Burkhardt was of the opinion that gradual desegregation would be best for the students and for the community. He felt that an abrupt change would affect the teachers and the students of both races and would create serious administrative problems.

Dr. Moffett, another Member of the Board, felt that Plan Nine was the best plan for the Knoxville schools and gave three principal reasons to support his belief, which are in substance as follows:

- (a) First grade eliminates any educational advantages or disadvantages.
- (b) The present Plan is more receptive to constituents.
- (c) The present Plan is better for teachers and other personnel of the schools.

Andrew Johnson, a well-known lawyer of Knoxville, served as a Member of the Board from January 1, 1954 through December 31, 1957. He explained in detail the careful study made by Members of the Board and school personnel during the period that he was a Board Member.

*[Building Program]*

A building program involving some eight million dollars was inaugurated and extensively carried on while he served as a Member of the Board. This program consumed considerable time of Board Members.

A series of meetings were held by Board Members with the Superintendent and his Staff during the year 1955 when desegregation matters were discussed. The initial attitude of the Board was to comply with the law with respect



to desegregation as declared by the Supreme Court in the Brown Case. In 1954, the Members of the Board felt that desegregation could be effectuated without too many problems because the citizenship at that time appeared to be passive. Later, the Board Members began to hear rumbling of the disturbances from citizens and when actual violence began in Clinton, it caused the Board to go slow. This violence gave rise to a consciousness of the Members of the Board of the dangers of making an unwise step. The Board was delayed by circumstances over which it had no control.

The opinion of the public influenced the actions of the Board. The Board was looking at local conditions. Threats of violence were made if desegregation were inaugurated. On June 10, 1957, some fifteen citizens appeared before the Court and some of them suggested that the Board Members resign rather than institute desegregation. There was real danger.

One John Kasper appeared before the Board that night. Mr. Johnson received a number of telephone threats. The Members of the Board were afraid of physical violence against the colored children. At that time, the colored principals of the schools felt that desegregation should be given thorough consideration, but that it should not start immediately.

#### *[Effect of Dynamiting]*

The dynamiting and other violence in Clinton and Nashville were other causes for the Board moving towards desegregation more slowly.

Mr. Marable is Supervisor of Child Personnel. He handles transfers. He stated that the schools were overcrowded in some sections. Transfers were comparatively easy under the old plan although they are considered carefully. If the reasons are good, a transfer is made. It is an administrative matter. Primarily, a child is expected to go to school in the zone of his residence.

Plaintiffs, Mrs. Barber, and Messrs. Robinson, Sr., Ward, Graves, Winston, Sr. and Goss, testified to having made applications for admittance of their minor children to white schools, all as shown in the complaint and the stipulation, and that they were denied admittance solely because of their race or color. Each of these plaintiffs gave a reason why he wanted his infant child to attend a white school, one of the reasons being that he or she lived near the white school.

This Court is of the opinion and finds that the foregoing evidence shows beyond question good faith on the part of the Board in making an honest effort to find the solution of a very troublesome problem, namely, a plan of desegregation that would best fit the needs of the Knoxville area and at the same time implement the decision of the Supreme Court in the Brown Case. The teaching of that case, as well as that of the cases of *Cooper v. Aaron*, supra, and *Kelley v. Board of Education*, (C. A. 6) 270 F.2d. 209, is that the problem of desegregation must be solved in accordance with the exigencies of the case and that the interest of the school children of both races, the interest of the school personnel and of the community involved are the prime factors in resolving the issue; that local school problems differ and what would be a reasonable time to integrate in one community might be unreasonable in another community; that the question of speed is to be decided with respect to existing local conditions; that the operation of the public schools is the business of the local School Board and that the courts should not interfere with such operation unless it is necessary for the enforcement of constitutional rights; and that the Court should not substitute its judgment for that of the local School Board in the promulgation of plans of desegregation and that if the Board has acted in good faith its action should not be set aside so long as such action is consistent with the eventual establishment of a non-discriminatory school system at the earliest possible date consistent with the interest of the school children, school personnel and the community.

#### *[Plan Supported]*

The Court finds that the Plan submitted by the Board is not only supported by the preponderance of the evidence, but by all of the evidence, with one exception. With reference to the technical courses offered in the Fulton High School to which colored students have no access, it directs that the defendants in this cause restudy the problem there presented and present a plan within a reasonable time which will give the colored students who desire these technical courses an opportunity to take them.

This Court is concerned—gravely concerned—with the incidents of unrest and violence which have attended the desegregation of schools in nearby communities. They have not only been made matters of evidence in this case, but some

are matters with which this Court has had to deal, and of which it takes judicial notice. These incidents have been characterized by the bombing of homes and of school buildings and by acts of individual terrorism which have destroyed the orderly atmosphere in which good schooling can thrive. They have revealed pockets of hate and lawlessness which are overshadowing imponderables in this case.

Glowing pictures of what may be, or ought to be, characterize the partisanship of those not called upon to make decisions. It is easy to ignore, and many of these partisans have ignored, considerations which weigh so heavily upon the Court. Some who might have taken responsibility have, despite the admonitions of the Supreme Court in the Brown and other cases, chosen not to assume it.

#### *[Responsibility of Court]*

As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.

If it decides wrongly, the transition toward the goal of a harmonious and unified school system—a goal to which all parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not them-

selves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there.

Perhaps the transition could be faster. Who can know? When a bridge is built or modified, engineers add a factor of safety far beyond the expected load. The analogy breaks down. In altering a school system, no one knows the load; there is no known factor of safety. Traditions, ways of thinking, aspirations, human emotions—all are involved. Emotions are sometimes stable, sometimes explosive. This Court has had experience with both. It rather anticipates that the emotions of the people of Knoxville are under control. It does not know. It would have had the same expectation of another community. It was wrong.

All things considered, Plan Nine seems to offer more safety and more assurance for an orderly progression toward a fully unified school system. Under the evidence, there is less danger of disorder—more hope of steady progress. When the risks of which this Court is cognizant are taken into account, Plan Nine seems to meet the tests laid down by the Supreme Court. The Plan, with the reservation noted, is approved.

## EDUCATION

### Public Schools—Texas

**Hilda Ruth BORDERS, a Minor, by her father, etc. v. Dr. Edwin L. RIPPEY, et al., etc.**

United States District Court, Northern District, Texas, Dallas Division, May 25 and June 4, 1960, 184 F.Supp. 402.

**SUMMARY:** In a class action, Dallas County, Texas, Negro children sought a declaration of rights and injunctive relief ordering their admission to county schools on a nonsegregated basis. After extended litigation [see summary at 3 Race Rel. L. Rep. 17 (1958)] the court issued an order requiring desegregation beginning at the January, 1958 term. 2 Race Rel. L. Rep. 985 (1957). On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded with instructions that before a specific date should be fixed or orders or judgments entered to require desegregation, "The school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility." 250 F.2d 690, 3 Race Rel. L. Rep. 17 (1957). The district court subsequently denied a motion by plain-

tiffs for an order requiring defendants to desegregate immediately. The court held that defendants had made a prompt and reasonable start and were proceeding toward a good faith compliance with pertinent judicial orders and judgments and were pursuing legal remedies under 1957 Texas legislation [2 Race Rel. L. Rep. 695 (1957)], which remedies plaintiffs had not exhausted; and that it was physically impossible and impracticable to integrate the schools by the beginning of the 1959 school year. The court recessed the hearing until April, 1960, holding that further time should elapse before the setting of a definite date for desegregation, in order that new conditions and evidence might be considered. But defendants were directed to take steps to call an election as provided by the 1957 legislation, and such other steps as are possible to comply with present federal court decisions. 4 Race Rel. L. Rep. 877 (1959). Plaintiffs appealed, and the Court of Appeals ruled that the district court should have required the defendants to make a prompt and reasonable start toward compliance by submitting a plan for effectuating a transition to a racially nondiscriminatory school system in time for the April hearing. Since that time was almost at hand, the court allowed 30 days for compliance; and the district court was directed to hold a hearing promptly. 275 F.2d 850, 5 Race Rel. L. Rep. 392. On April 30, the board submitted a plan for grade-a-year desegregation with a liberal system of transfers. On hearing, the court suggested that it would approve a plan whereby three classes of schools would be set up—one for Negroes, one for whites, and one for those wanting integration. The board submitted such a plan, which was approved by the court. Reproduced below are: the school board's original plan; the court's opinion and a statement from the bench discussing various social, political, economic, and religious aspects of the segregation situation; the board's amended plan; and the court's order approving that plan.

## Defendants' First Supplemental Answer

### TO SAID HONORABLE COURT:

Come now Defendants, pursuant to the Opinion and Judgment of the United States Court of Appeals for the Fifth District, and submit a plan for effectuating a transition to a racially, non-discriminatory school system as set out in "Exhibit 1" attached hereto and made a part hereof. It is the best plan the Defendants have thus far been able to evolve after long study and profound reflection.

Dallas Independent School District is a huge and complex business organization and consequently has to make plans at least a year ahead of time from both a financial budgetary standpoint and from an administrative standpoint. On this account, the plans for the next school year which begins on September next have already been formulated and, therefore, it would be practically impossible to bring about the momentous task of integration prior to the beginning of the next scholastic year, September 1961. In this connection, Defendants point out that beginning next September, there will be 4,400 classroom teachers, 144 principals, 32 assistant principals, 271 secretaries and clerical employees, 50 administrative and supervisory

personnel, with 671 custodial employees, 830 lunchrooms and other personnel, totaling 6,398 employees, with 152 school buildings. The School District also has a scholastic population of 146,317 with estimated 100,000 homes and 200,000 parents involved. It is apparent, therefore, that desegregation of the schools is not a simple matter of placing the children of different races in the same classes, but that it also will require careful and determined preparation and conditioning on the part of the total community over a period of years, and because of the great expansion in the population within the District, all of the echelons above mentioned will be much greater for the scholastic year which begins in September, 1961.

Defendants are giving every continuing thought to the problem and, therefore, must reserve the right to amend the plan submitted and to submit an alternate plan if their best judgment so warrants.

Respectfully submitted,

H. W. STRASBURGER  
300 Gulf States Building  
Dallas 1, Texas  
Attorney for Defendants.

"EXHIBIT 1"

BE IT RESOLVED by the Board of Education of the Dallas Independent School District, pursuant to the opinion and judgment by the United States Circuit Court of Appeals for the Fifth District at New Orleans handed down on March 11, 1960, that desegregation of the schools within the District be approved as hereinafter set out.

BE IT FURTHER RESOLVED that the Board of Education now determine and announce the following plan to comply with the decision of the Supreme Court of the United States in the case of *Brown vs. Board of Education*, said plan to take effect initially as of September 1, 1961:

We recognize that the desegregation of the schools in the Dallas Independent School District will be a revolution in the social mores and traditions of the community, and that habits of life of generations past will be uprooted, but it is our purpose to bring this process into being with the least possible friction, misunderstanding, and displacement of educational opportunities; because not only are the children and the homes represented in the schools involved, but the total community life and population are likewise involved. To expedite the program and plan, a period of adjustment and definite preparation will be required.

The best plan the District has been able to evolve, after long study and profound reflection, is as follows:

1. The provisions of Paragraphs 2, 3, 4, 5, and 6 of this plan are subject to the following conditions: Provided that, prior to September, 1961, an election called upon a petition signed by at least 20% of the qualified electors residing in the Dallas Independent School District has been held and has resulted in a vote in favor of abolishing the dual public school system in accordance with H. B. 65 (Article 2900-a, V.A.C.S.). If no such election has been held and no such favorable vote has been obtained prior to the beginning of the scholastic year in September, 1961, then compulsory segregation based upon race shall be abolished in Grade One of the elementary schools of the Dallas Independent School District in the first scholastic year beginning after such election has been held and such favorable vote obtained, and accordingly the dates scheduled hereinafter for the desegregation of the succeeding grades will be modified to follow in due order.
2. Compulsory segregation based upon race is abolished in Grade One of the elementary schools of the Dallas Independent School District for the scholastic year beginning in September, 1961; and each succeeding September, beginning in September, 1962, the next succeeding Grade will be desegregated until all twelve Grades in the complete schools have been desegregated.
3. A plan of school zoning or districting based upon location of school buildings and the latest scholastic census without reference to race will be established for the administration of the first grade and for other grades as hereafter desegregated.
4. Every student entering the first grade in September, 1961, will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may be necessary in particular instances.
5. Applications for transfer of first-grade students from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.
6. The following will be regarded as some of the valid conditions to support application for transfer:
  - a. When a white student would otherwise be required to attend a school previously serving colored students only;
  - b. When a colored student would otherwise be required to attend a school previously serving white students only;
  - c. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.
7. Orientation of teachers with respect to dealing with and teaching the children of



different races and of different sociological backgrounds all in the same classroom requires meticulous preparation. Numerous clinics, work shops, seminars, and joint study groups must be pursued during the year 1960-61 and in succeeding years to bring about a state of amity and congeniality for these new assignments.

8. Likewise, orientation of teachers with respect to the educational processes of teaching children who have different degrees of ability levels and achievement in the same classrooms will be one of our endeavors. Tolerance and understanding are involved in this undertaking.
9. Time and preparation will be required for conditioning teachers to the communication involvements with mixed groups. Both white and Negro teachers will require a period of anticipation after the plan for desegregation is approved and announced. During this period a way of thinking will be developed so as to minimize the risks and embarrassments for both races. The conditioning effort anticipated will amount to development in ways of thinking and doing which will cause teachers and pupils to be agreeable to one another while working together, both through desire and in their many automatic responses.
10. Parents and parent organizations will require orientation where mixed groups will come about as a result of desegregation.
11. As one of the means for bringing about these ends outlined, we shall start a program of orientation in September, 1960, among the children and parents concerned with desegregated classes in the Fall of 1961. It is highly important that these first desegregated classes be successful organizations. Only in such organizations can profitable teaching be carried on. The parents and the children of both races will require this orientation. Each year these orientation programs will continue for the next succeeding group of pupils to be desegregated the following year.
12. In years past, teachers meetings and convocations within the District have been on a segregated basis. Beginning in September, 1960, bi-racial convocations, bi-racial

teachers meetings, bi-racial seminars, and bi-racial study groups will be organized to prepare white and Negro teachers to accept each other on a professional level, to the end that the working for common goals in the education of the children of Dallas will be harmoniously projected.

To accomplish the purposes and program outlined above is a monumental task, and the least possible time which will permit of effective accomplishments will require that desegregation not be attempted before September 1, 1961. To implement effectively the successful accomplishment of the plan above, the administrative officers of the School District have prepared a calendar of preparatory steps as set out in Exhibit "A", attached hereto and made a part hereof.

## DESEGREGATION PLAN

### Exhibit A

#### 1. Convocations

For the first time, in 1960-61 convocations for both white and Negro personnel will be held in the same meeting place. These convocations will involve 4800 individuals. In these meetings the Superintendent of Schools brings to the personnel plans, philosophy, procedures, and operating policies for the School District. The Municipal Auditorium has been retained for these dates:

September 17, 1960  
April 29, 1961

#### 2. Curriculum Council

The functions of the Curriculum Council, to be composed of representative teachers, principals, and supervisors from elementary, junior high, and senior high schools of both races, will evaluate curriculum and instructional procedures.

It is the announced policy of this School District to have no watering down or dilution of courses and curricula. However, a very real problem exists because of the three years variation in aptitude and performance of like-age children between the two races. It will, therefore, be necessary to study ways and means of classification and assignment of children so as to achieve a condition and a climate for teaching and

learning. Meeting dates for the District-wide Council will be:

September 13, 1960  
October 11, 1960  
November 8, 1960  
December 13, 1960  
January 10, 1961  
February 14, 1961  
March 14, 1961  
April 11, 1961  
May 9, 1961

Numerous subcommittee meetings will grow out of these Council meetings.

### 3. Seminars for Classroom Teachers

Since a great deal of time will be required for teachers to become conditioned in their involvements with mixed groups, seminars will be organized on a bi-racial basis. In these seminars a way of thinking will be developed so as to lessen the risk of embarrassment of both races. This anticipated effort will result in ways of thinking and doing which will cause teachers and pupils of both races to be agreeable to each other while working together in their duties and in their many automatic responses. These seminars will be on a district-wide basis according to this calendar:

#### *Seminar No. 1—1960*

September 26, 29  
October 10, 13, 17, 20, 24, 27  
November 7, 10, 14, 17, 21, 24, 28  
December 1

#### *Seminar No. 2—1960-61*

December 5, 8, 12, 15, 19  
January 9, 12, 16, 19, 23, 26, 30  
February 2, 6, 9, 13

#### *Seminar No. 3—1961*

February 20, 23, 27  
March 2, 6, 9, 13, 16, 20, 23, 27, 30  
April 6, 10, 13, 17

### 4. Principal, Teacher, and Staff Meetings

Principals, teachers, and staff members will be required to join in a common study to prepare themselves and their students for the desegregated instructional pattern in the offing. The following calendar for these meetings is established:

September 8, 1960  
September 22, 1960  
October 4, 1960  
November 1, 1960  
December 6, 1960

January 3, 1961  
February 7, 1961  
March 7, 1961  
April 4, 1961  
May 2, 1961

### 5. Methods of Teaching

Methods of teaching will be studied by city-wide bi-racial committees and in individual buildings throughout the District. Committees of teachers, principals, and staff members will be appointed to participate in this study, making reports to the supervisory and instructional officials of the School System to the end that efficiency may be preserved in the classrooms of the District. The committee meetings on a District-wide basis will be held on these days:

September 26, 1960  
October 17, 1960  
November 21, 1960  
December 19, 1960  
January 23, 1961  
February 20, 1961  
March 20, 1961  
April 24, 1961  
May 15, 1961

Necessarily, hundreds of teachers and principals not on the Central Committee will also be formed into subcommittees and will have numerous meetings on succeeding dates.

### 6. Community Observance of Education

Each year in November and again in March the citizens of the Dallas Independent School District observe "American Education Week" and "Texas Public Schools Week." In order that the new viewpoint for this District-wide observance may be better understood, committee meetings of staff members, teachers, and representatives of the Parent-Teacher Associations of both races and bi-racially must be held in the fall and early spring. These meetings will involve thousands of people. Dates for these over-all policy meetings will be:

September 15, 1960  
October 13, 1960  
December 8, 1960  
January 11, 1961  
February 2, 1961

### 7. Information and Liaison on a Community-Wide Basis

The news and informational institutions such as newspapers, radio and television stations, the many organizations devoted to community betterment and the promulgation of information on a community-wide basis, the allied organizations dedicated to the growth and security of youth, and the character-building institutions, will all be called into service to secure a community front of solidarity in a successful operation of gradual desegregation in the School District.

#### 8. Preschool Children and Parents

Throughout the year 1960-61, facing such a radical departure from present conditions in the community, we shall find it necessary for principals and teachers to work with the beginning children for 1961 and with their parents with a view to acclimating them to a friendly association in desegregated classrooms. These meetings will be held monthly following the opening of school (September 7, 1960).

Necessarily, numerous bi-racial subcommittee meetings composed of additional teachers, supervisors, principals, and parents will be held following these district-wide conferences. This same plan of conditioning the children and parents in succeeding grades to be desegregated from year to year will be followed.

#### 9. Parent-Teacher Associations

Within the Dallas Independent School District are two groups of parent-teacher organizations: (1) a white group; (2) a Negro group. Each organization has its central body known as the Dallas Council of Parents and Teachers. There are also Dads Clubs of both races. Definite liaison must be established between these two racial groups with a view to lessening the shock and likelihood of misunderstanding on the part of parents as the School System approaches desegregation. To accomplish this purpose, the School Administration is proposing the following calendar for a joint study of representatives of the two organizations:

September 19, 1960  
October 10, 1960  
November 14, 1960  
December 12, 1960  
January 16, 1961  
February 13, 1961  
March 13, 1961  
April 17, 1961  
May 15, 1961

10. Each succeeding year a similar calendar of meetings, study groups, seminars, and professional activities will be continued.

## Opinion in U. S. District Court

DAVIDSON, District Judge

We come now to hear the plans submitted by the Dallas School Board and the opposition from the plaintiffs.

We bear in mind that nothing we can do will dispense with integration. The matter under consideration is the adoption of a plan that will call for the least worry and confusion.

The City of Dallas has had exceptionally good relations between the two races and the question largely is how much haste can be exercised in applying integration by force.

In referring this back to the trial court, the Supreme Court said:

"Full implementation of these constitutional principles may require solution of varied local school problems. \* \* \* Because of their proximity to local conditions and

the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. \* \* \*

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. \* \* \* "Brown v. Board of Education, 349 U.S. 294, 299, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083.

Few things were ever done in haste but what a further consideration in retrospect would show that a better job could have been done.

The protest or contest on the School Board's plan by the plaintiffs offers no substitute but

amounts to a demand for unconditional surrender of the Board's position and calls for total and complete integration only.

We do not think this position is necessarily implied from the wording of the Brown case which is above quoted.

#### INTEGRATION OF RACES BY FORCE

The question at issue in this hearing concisely stated is: Can the white and black school children of Dallas be presently and hastily integrated by force without frustration and injury to their educational opportunities.

In reaching our conclusions upon so vital a subject, history, psychology and testimony will be considered each in its place.

History repeats itself. It was Patrick Henry's lamp of experience by which his feet were guided and this experience is not limited to his life but reaches back through the annals of time. The same act will produce like result. What happened yesterday under like circumstances will probably happen again tomorrow. In determining the future of a people history transcends all other guides in showing the way. We must not fail to consult it in this present dilemma. In such connection there are those who would decry the importance of historical matter in questions like this. To them history is like unto the horse and buggy days or the covered wagon regime and is now outmoded by modern discovery and appliances. To so consider it is a grave error. Justice is the same today that it was yesterday. Truth, integrity, reverence, honor, loyalty, virtue have been through the eternal ages, and are today the same thing. It isn't the vehicle that counts, but the man that rides in it whether it was a covered wagon or a jet plane. They each may reach their destination and make their mark in history.

A decree and mandate of a court is force calling if need be the power of the nation itself. Force the key and you jam the lock. Ishmael was forced into the desert maybe to die that there be a warm place made for his half brother Isaac. Ishmael lived, however, and in hate generated by force raised the back of his hand to Isaac forever. Three thousand years have gone by, but there is firing on the Syrian border and even under the walls of the Holy City, though the contending parties, the Arab and the Hebrew, are descendants of a common father, Abraham. The armies of France have by force

wholly failed to make the French settler in Algeria and the Arabs love each other.

In this distracting question who can say that time and patience may not find a better way to amicably adjust the differences than the use of force?

"I do believe that if we attempt merely by passing a lot of laws to force some one to like some one else we are just going to get into trouble." General Dwight D. Eisenhower in 1948

When Ike so reasoned it was the Texan within him. It sounds like home folks talking.

#### PROCEED NOT TOO RAPIDLY

All people stand to lose by the hasty, rash application of force.

Why so urgent and imperative is speedy action? What has integration itself accomplished in the lands where it has existed for centuries?

In the colonial period France had two promising colonies in America: Quebec on the frozen icebound shores of the St. Lawrence and Haiti, Guadalupe et al. in the West Indies. In Quebec there was no integration. The 4,000,000 French Canadians are a religious, orderly people. In Haiti the integration had been but shortly allowed when one race destroyed the other. In Puerto Rico integration and amalgamation early became the order. In the Southern States the white and the former slave each retained his racial integrity. Is the Puerto Rican any better advanced than the Southern Negro? No Southern Negro has ever shot up the halls of Congress, killed the President's guard and sought his life. One was integrated and the other was not.

Cuba was integrated at an early period. Costa Rica has no racial amalgamation or integration. All is peace, progress and beauty in Costa Rica, while blood and discord flow in Cuba.

Integration has not helped either race. It has retarded the development of every land where it has occurred.

Why rush it here? Rather "let patience have his perfect work."

If we are to have integration better let it be by consent and not by force.

Few things have been done in haste but that with time and due consideration it would have been a better job.

#### SLAVERY

"Some strand of our own misdoing is in-



involved in every quarrel." Robert Louis Stevenson

The problem now before us stems from another in the past—human slavery. Its blight follows us down through the memory of our forebears from wheresoever we may have come. It reaches from the devout men of New England like Governor Endicott, Elder Brewster, Governor Bradford, Roger Williams and others. Their sons and descendants sold prisoners of war, then wild Indians, into slavery as did the Romans in the centuries past. Columbus, the Christian gentleman that he was, by force and fraud sent five shiploads of natives from the West Indies to be sold in the slave markets of Spain. And from the West Indies up it touched us all in one form or another.

It was the last fragment of an institution handed to us from a universal practice and since everybody had been guilty it was tolerated since the other fellow was doing it too. Even the King of England when petitioned by the Legislature of the Colony of Virginia<sup>1</sup> to stop the slave

1. In a knowledge of statecraft and foresight, or as we might term it foreseeability, the Colony of Virginia has probably surpassed every nation or locality with the possible exception of Athens alone. There was Washington without whom there would have been no United States. There was Madison, the father of the Constitution itself. There was John Marshall, the outstanding, great Chief Justice of all time. There was Thomas Jefferson, the father of democratic ideals of government. There were the Lees who for seven generations, according to John Adams of Massachusetts, produced a continuing line of great Americans, and this was just down to the time of the Revolution. In moments of calm and deliberate thought our nation has often profited most by the wisdom of these men.

The action of the Virginia Colony in 1772 is itself unusually interesting as follows:

"Wednesday, the 1st of April, 12 George, III, 1772.

"Most Gracious Sovereign,

"We, your Majesty's dutiful and loyal Subjects, the Burgesses of Virginia, now met in General Assembly, beg Leave, with all Humility, to approach your Royal Presence.

"The many Instances of your Majesty's benevolent Intentions and most gracious Disposition to promote the Prosperity and Happiness of your Subjects in the Colonies, encourage us to look up to the Throne, and implore your Majesty's paternal Assistance in averting a Calamity of a most alarming Nature.

"The Importation of Slaves into the Colonies from the Coast of Africa hath long been considered as a Trade of great Inhumanity, and, under its present Encouragement, we have too much Reason to fear will endanger the very Existence of your Majesty's American Dominions.

"We are sensible that some of your Majesty's Subjects in Great-Britain may reap Emoluments from this Sort of Traffic, but when we consider that

traffic turned a deaf ear. His ships were perhaps participating in the traffic.

Nothing in all the dark stories of the years surpasses the horror of a slave ship. A wild people from the desert, from the jungles on board a ship. They could not understand the language of the shipmaster. They knew not the use of sewerage even if any had been available. The very odor of the cargo was stifling to any that came near.

The slave had been recently at home in the African continent, but when one tribe fought against the other the losing side or some portion of it was sold into slavery just as Joseph was by his brethren. The Arab slave trader often brought him to a port and loaded him on a ship to be brought to the new America, first to the Indies and then to the plantation of the South. When he would debark from the ship he knew not what next. Nobody could tell him and he could tell nobody. He could neither read nor write. No one knew his name and it was yet some generations before he had a family or surname. To be freed from his recent captors and from the foul condition of the ship was for a moment a relief no doubt to this poor fellow when he was inducted into the wide open space of a Southern plantation with open air, food and kindness.

#### [Taught Language]

The first step of the planter was to teach him by degrees ability to speak English, the vocabulary being short at first. The next forward step of the slave was his conversion to Christianity.

it greatly retards the Settlement of the Colonies, with more useful Inhabitants, and may, in Time, have the most destructive Influence, we presume to hope that the Interest of a few will be disregarded when placed in Competition with the Security and Happiness of such Numbers of your Majesty's dutiful and loyal Subjects.

"Deeply impressed with these Sentiments, we most humbly beseech your Majesty to remove all those Restraints on your Majesty's Governors of this Colony, which inhibit their assenting to such Laws as might check so very pernicious a Commerce.

"Your Majesty's antient Colony and Dominion of Virginia hath, at all Times, and upon every Occasion, been entirely devoted to your Majesty's sacred Person and Government, and we cannot forego this Opportunity of renewing those Assurances of the truest Loyalty, and warmest Affection, which we have so often, with the greatest Sincerity, given to the best of Kings, whose Wisdom and Goodness we esteem the surest Pledges of the Happiness of all his People."

A photostatic copy of the document addressed to King George is here before us, signed by Peyton Randolph, Speaker.

The masters and the masters' ministers were the prime movers. The whites attended church in the forenoon. In the afternoon the slaves were inducted into the same building and heard the same preacher. Later on the slaves began to develop ministers of their own and though they were not educated ministers they partook of what they had heard and their reasoning and understanding of the peace of eternal life and the punishment for wrongdoing became almost immediately an important part of their life. Immortality yes, for a good and just life here there was a reward and beyond the river of death were the members of his departed family waiting in heaven and that was the reward of doing right. There was a reward for wicked living. He learned that in the story of Lazarus when Dives, the selfish old sinner, looked up from hell and asked God to send Lazarus down with some water to cool his parched tongue because he was "tormented in these flames." He heard and accepted that great and final judgment when the last day should arrive. When the life of the good would be found written in a book and the book should be opened and the Great Judge would say to those whose names were not written therein, depart to my left into eternal and "everlasting fire." The Negro therefore believed in heaven and hell just as our ministers did two generations back and just as our parents did. He believed it without a doubt.

This religious faith led to one of the most phenomenal events in religious history. When the fratricidal strife was on between the states, when brother sought the blood of brother and eleven states walked out of the Union, every man available went into the army. There was nobody left to run the plantations but the slaves and the mistress of the great house. She took these slaves and they ran the plantation. She knew how to do it. They also had a Negro foreman who also knew how to do it and the South carried on. Production kept up. They had plenty on which to live. Sherman's army found an abundance as he marched through Georgia. Four years the bloodletting went on. More than two million black men running the plantations under the direction of their mistress never for once took her life or molested her person. Such a story of loyalty's devotion was never before told nor since witnessed. They wouldn't molest that mistress. They knew in hell they would wake up and they didn't want to go. A religious faith that carried with it a firm belief in the punish-

ment for wrongdoing and a reward for righteous living bore fruit in this distressing hour. Quite different is the confused, latterday delinquent who now has no dream of immortality or no faith of his own and who thinks supernatural and superstition are twin words and that the devil and Santa Claus are one person and that's nobody but pa.

#### [*Mistress a Physician*]

Another thing could have entered into it to some degree. The mistress of the plantation was something of a physician in her own family. She knew all the old home remedies and she knew how to rear her children and treat them when they were sick. Every remedy she used in her own household she used in the cabin of her slaves. They looked to her when in pain, when in trouble, when hungry and when in need. She was their great benefactor and they did not harm her.

Indeed as of old

"The eyes of the servants look unto the hand of their masters. The eyes of the maiden to her mistress." 123rd Psalm

The Negro when treated kindly is one of the most loyal of all races. But there came an interruption. He was summoned up to the big house and told he was now free. This was welcome news to him. He had been expecting it. But these strong black people wept at the feet of their mistress, not because they were free but because they were parting from some one they loved. Pardon a personal reference as it were, but such is the story that my grandmother has often told me. Just the other day we were talking to Honorable Neth Leachman, an outstanding member of the Dallas Bar. His grandparents were slaveholders in Harrison County near the City of Marshall and without knowing the story of my own grandmother he told me in identical language the story of his grandmother and how the slaves wept when freed.

#### [*Selfish Reasons*]

But the slave had a new leader. The carpet-bagger came for entirely selfish reasons. He caused the Negro in so many ways to forget his God. The happy relation between the white and the black was interrupted and even race riots seemed to be in the offing and for 10 years the Negro looked to a new leader.

However, when President Hayes withdrew the

army the Negro now looked round and ere long he and the son of his former mistress were together again, almost as before. Booker Washington so fully illustrated this in his great speech delivered at Wiley University at Marshall in the heyday of his life and strength. Turning to the young men from that institution, whither I had gone with the superintendent of public instruction and others; he said to the young Negroes present: If you want to climb, there is a way. There is a sure way and at which none will say to you nay. The route is by *excellence*. If you are a janitor, be a better janitor than any other janitor. If you wash clothes, wash them cleaner. If you farm, raise a better crop, and like the man that built the mouse trap the world will want you and need you. Excellence brings promotion just like gravity causes water to flow.

At this time the Negroes were beginning to acquire homes and farms in the county. Occasionally an unscrupulous man would get their land notes and try in this and various ways to defraud them of their purchase. I represented quite a number and I never lost a suit for a Negro when I represented him in a land case. So well was this recognized that Honorable S. P. Jones, a very prominent attorney in the same city, remarked that anyone that represented a white man in a suit against a Negro when there was land involved started in the case with a handicap because the white juror of the county took it for granted that the white man was probably trying to steal the Negro's land.

#### [Ancestors' Slaves]

Referring again to the days of slavery, again I illustrate from my own family. My grandfather and great-grandfather had many, many slaves. My great-grandfather built his slaves brick houses that they might be comfortable. He taught them to be good carpenters, to be good bricklayers as well as farmers. He used a Negro for foreman and never let a slave be whipped except upon his own orders. The foreman was named Nathaniel, his wife Chaney. He gave him a horse and buggy and set him free. I read a little sketch the other day where the last surviving slave of Thomas Jefferson was quoted as saying, "Master Tom was always kind to us."

I tell these little incidents because they are only specimens of hundreds that occurred through the country. The mountain does not tell the course of the wind. The straw on its side will and does.

The Booker Washington slogan of *excellence* reaches every avenue of life. I see before me in this courtroom a Negro lawyer raised in Sherman, a town about the size of Marshall. He rose to distinction in that town. He commanded the respect and admiration of the white lawyers. He succeeded there and has moved here to Dallas. No one holds any animus towards W. J. Durham.

The formula of Booker Washington for the Negro's future was embraced in the word *excellence* and along the same line was a former decision of our highest court which at that time was the law as it interpreted it, rendered in 1896, the case being *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. That decision in effect provided that the Negro as a race was entitled under the Constitution to equal opportunities in every field covered by the Constitution and the law of the land. In other words, it embraced the very epitome of free government—equal opportunities. Equal opportunity to the youth is held out in every schoolroom, in every court, in all elements of justice and freedom. Equal opportunity to the black race and the white race has long been the policy of our government. I have here before me some pictures for instance of the school buildings in the City of Dallas in which the colored youth are being taught. In the years gone by few children either white or black ever had the opportunity of attending school in such buildings. With equal opportunity to progress under the law and to rise under the natural law of excellence the Negro has made magnificent progress. Joe Louis did not need an act of Congress or a decision of a court to enable him to be the world's champion. His excellence in taking and giving punishment was the test. The Negro has now in proportion to the population largely taken over prize fighting and boxing as a sport and an entertainment. His rise was not an act of Congress nor a decree of a court. The Negro has appeared upon the diamond. The court didn't put him there, the law didn't put him there. He got there because he was able to run and play ball and excel as Booker Washington advised.

If there is a good farm or plantation for rent the Negro doesn't need the law or a court to give him an award or chance by which he may take over the profit and benefit of that plantation. The only test, is he a better farmer and can he make better result, again Booker Washington's test of *excellence*.

We have elsewhere spoken of Wiley University. It was really a great Negro school under the care and direction of its former president Dr. M. W. Dogan. By his invitation I have on a number of occasions visited his school. And when his choir which embraced almost every student would sing "Swing Low, Sweet Chariot" no grand opera has ever surpassed it. The very rafters would seem to rise and swell with the tones of melody and music. They needed no court or legislative enactment to attain this perfection, only a matter of *excellence*.

For a number of years I was City Attorney in Marshall when Dogan was running the school. During that time hundreds of colored boys passed through this University and not during the whole six years did one of them ever come into the police court of that city, so well behaved were these young men. This too was a matter of *excellence* resulting under the training of a great man. As long as he lived he would frequently wire me or write me his congratulation or approval on different things that had come before me and though he is gone his grandchildren still remember me by sending notices of their graduation in school.

#### [Negroes Not Handicapped]

Under the system that we have enjoyed for the past 60-odd years at least the Negro has had few handicaps and today if a Negro doctor, and there are many good Negro doctors, should discover a cure for cancer, the white population would flock to him for treatment. They would not ask about his color. Again, according to Booker Washington, it would be a matter of *excellence*. The Negro has not been held down and denied opportunities as some mistaken minds have supposed. I was impressed recently by the observation of a Negro minister who in speaking to me said: "You white people have had 4000 years to reach your standard while we Negroes have had only about 90. We think we are doing pretty well." I had to admit in my mind that he had something.

The Negro has a racial pride where he is let alone as well as the white. And he has something to be proud of. His advancement from slavery has been one of the most marvelous stories ever told. He has a right to have his child or his grandchild to be born black like he is.

When I was practicing law in Marshall a colored woman sought to employ me to sue her lodge. She stated that her lodge was designed

to preserve the purity and integrity of the colored race and that any member who broke their rules in that particular was expelled and that she had been unjustly expelled because the white man calling at her house came as a bill collector for furniture and not for any evil or improper purpose. I didn't take the case, but I commended the purpose of the lodge.

The colored ministers have joined in this attitude and you can well see the result. You walk along streets where the Negroes are more numerous than the whites, but you rarely see a mulatto child. An elderly darkie observing a mulatto child: "He can't help it. I feel kindly toward him, but I don't think much of his mama and papa."

#### THE TRAGIC ERA

There are those who would question the kindly feeling of white to colored and then further ask if this good relation exists why do Southern people resist integration. Fear! Fear of that which was and which may happen again. Memory of the tragic era, the ten years of Reconstruction, is still green in the minds of the old South. Perhaps you have only a very indistinct memory, almost no information concerning such a period. Read "The Tragic Era" by Claud Bowers, a Northern Congressman, and you will be astonished by what took place.

Listen to the stories that have been told and written and preserved by the surviving inhabitants of this era. Read Ellis' History of the United States in Vol. 5, pages 1396 to 1399 and there find a confirmation of all that Claud Bowers stated in his book, "The Tragic Era." Nor do you have to look at Mississippi or South Carolina. Take any county where the Negro was in the majority and had fallen under the leadership of a carpetbagger of the North and a scallawag of nearby. The Negro forgot his former loyalty. He was now taught and led to believe that the white man had been his oppressor and it was now his turn to take charge. Take one colored county in East Texas. Take the old county of Harrison in which we were born and in which we practiced law for many years. The Negroes there were in the majority. There, designing leaders, mostly white, used the Negro and used him to the detriment of all concerned. They sent a Negro by the name of David Abner to the State Senate of Texas. They sent another Negro to the House of Representatives, but the places on the Commissioners Court and the county judgeship,



the county treasurer and other places that handled money and the tax money were given to the unscrupulous white leaders. In a little while the county's credit was gone. A juror's pay would not buy him a sandwich. The county script was worthless. The T&P Railroad was being built west from Marshall at that time. A Moses as we might call him now appeared in the person of a Yankee general, a prominent engineer known over the country as General Dodge. I have seen his picture and his aides framed like Lee and his generals or Grant and his. I once had one of his pictures which was presented to the late president of the Texas and Pacific Railroad. General Dodge and Edmund Key, President of the First National Bank, R. P. Littlejohn, J. F. Rosborough, Joe Lake, Amory Starr and some 15 of the white citizens held a meeting. Something must be done to save the county's credit. The railroad was particularly interested. The county had voted a major bond issue as a promise to the T&P Railroad to locate its shops and general offices in Marshall. These bonds of course would be worthless at maturity. Incidentally, I have one of those bonds which was subsequently paid and long after its liquidation came to me as a souvenir. These men formed a group which afterwards was known as the Citizens Party. They made up a list of candidates for the county offices and drafted men to run. They recognized that they were in the minority but they extended their group into other groups throughout the county and as the election approached they persuaded some of the oldtime darkies to stay away from the polls or go along with them and in some other cases they probably spread fear which would have involved them if we had had at that time a civil rights election law. The Citizens Party ticket won. The county taxes were properly allocated and apportioned. The credit went back up. The juror could draw his pay at face value. The T&P got its bonds paid in full and that though now more than 75 years ago has continued. It affected the entire stamina of the county's economic and political life. There has never been a bank failure in Harrison County. There was never a time in any of the panics that any depositor could not go to the bank and draw his money. And in 1908 when the banks over the nation closed the Marshall banks not only paid all depositors but took care of the payroll of the T&P Railroad from Marshall on to El Paso and when it was all over they had more money than

when it started, confidence in the stamina of the banks and in the population around them.

#### [*Massacre in Haiti*]

Now during this tragic era the account of the massacre in Haiti was still fresh in the minds of people then living. A magnificent white civilization in the West Indies that produced women like Empress Josephine, Napoleon's wife, passed under slave control, particularly on the Island of Haiti. Instead of integrating or amalgamating the races the Negro decided he would take over and he did. Every man, woman and child of the white race was massacred. Tradition tells of two little girls that were wrapped in unstripped sugar cane, smuggled on a ship and sent to New Orleans as the sole survivors of a magnificent white population.

In certain communities there were reports of a racial war about to start. It terrorized the whites. Nearly every plantation had a hunter's horn and the agreement was that that horn would be sounded so many times when the hour approached and the white population would assemble at a suitable place to defend themselves or die in the attempt.

All these things have been more or less forgotten and the people have tried to forget them.

There has through all the ages of history, however, existed an element in every race, in every sect and in every group to abuse power. And in the dark belt counties of the South there will come fear that into the midst of the Negro population there will again appear designing parties from afar and tell him that the power is his and to take over the county. There will be a strip so the Southerner fears of amalgamated spots stretching from the Potomac to the Brazos. From these counties many whites will remove and many unscrupulous whites for the sake of gain and power will associate themselves with the Negro to run the politics of the county. Maybe these things won't occur, but if a population in great degree feels that that may occur it constitutes a problem to be dealt with and to be dissipated. History does repeat.

#### HOME RULE—THAT BOON OF LOCAL SELF-GOVERNMENT

When a national power by force moves in upon a locality in disregard of the constitution as long understood and laws of a state and ordinance of a city acting without the consent of

the governed and thus arbitrarily overturns a social order, a usage and tradition of its people, it can but wound the pride of such people. The Declaration of Independence demands law by the consent of the governed and such indeed was the life long slogan of Woodrow Wilson. Lincoln's greatest effort, other than his Gettysburg address, was that in which he pled for the universal reverence of the law. A people ruled by law made without their consent are not a contented people. We forced national prohibition upon some states and localities. Under the leadership of F.D.R. we saw our mistake and repealed it in favor of local option.

Local option applied in this case would save our people of heartaches and discord.

Concede if we must that such a course be for our betterment, yet we must agree that the adjustment when amicably made will require less time than would a law made without their consent and which they had not helped to make.

Had we a world government which would be a grave mistake America would be standing out as a lone state begging for local self-government.

#### [Chinese Exclusion Act]

We did not, years ago, enact the Chinese exclusion law because of hate of such learned men as Confucius, Li Hung-Chang or Chiang Kai-Shek. But for the protection of such laws we would have been subjected to such a flood of immigration that we would have become a minority people in our own country.

A law for the integration of schools and consequent amalgamation of peoples was not made by the people of Texas nor its application invited by the schools of this city. Our people feel that it comes by remote control at the behest of good-meaning people who know not what they do and who refuse to profit by man's experience handed to us through the pages of history.

Marcus Aurelius, one of the few statesmen and philosophic rulers of the world-wide Roman Empire, proclaimed to the cities of the east, the west, the north and the south the great boon of local self-government. Prosperity and patriotism sprang into existence to a degree previously unknown.

When our fathers compelled King John to sign the Magna Charta they were mindful of the little subdivision of Wales and they wrote in Section 56 that where a Welshman had a land suit he might have it tried before a Welsh judge.

The original Thirteen Colonies were in the main settled each without reference to the other. They were Puritan, Baptist, Quaker, Catholic, Episcopal, Huguenots and then the poor in Georgia. They existed thusly for more than a hundred years when the Constitution was submitted to them. Almost every colony drafted its own bill of rights. And it is worthy of note that practically every colony made the right of local self-government first of all. James Madison collated these and condensed them into one Bill of Rights. And thus into the American Constitution came the right of local self-government, due largely to men like Patrick Henry and Samuel Adams. The states were here before the Federal government. King George surrendered his sovereignty to the states, not to the nation. So the crowning item of the Constitution is: Article 10 of the Bill of Rights reads:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

Patrick Henry, Alexander Stephens and John C. Calhoun stand forth as champions of states' rights or local self-government, but when they died states' rights as written in the Constitution did not die with them. The most powerful and convincing argument in support of local self-government was yet to be uttered on March 2, 1930 by the Governor of New York. His words were so apropos to the present situation that we adopt them as a part of our own reasoning:

"I have been asked to talk about the respective powers of the National and the State Governments to rule and regulate, where one begins and the other ends. . . .

"As a matter of fact and law, the governing rights of the States are all of those which have not been surrendered to the National Government . . . the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features. In these, Washington must not be encouraged to interfere.

. . . . It was clear to the framers of our Constitution that the greatest possible liberty of self-government must be given to each State, and that any national administration attempting to make all laws for

the whole Nation, \* \* \* would inevitably result at some future time in a dissolution of the Union itself.

"Let us remember that from the very beginning differences in climate, soil, conditions, habits and modes of living in States separated by thousands of miles rendered it necessary to give the fullest individual latitude to the individual States. \* \* \* It must be obvious that almost every new or old problem of government must be solved, if it is to be solved to the satisfaction of the people of the whole country, by each State in its own way."

New York by the repeal of the 18th Amendment took control of its whiskey traffic. Texans feel that they can control their schools as well as New York can her whiskey.

Local self-government, the right of a state to regulate its whiskey traffic, the right of a state to operate its public schools, the right of the state to expend its tax money with the consent and approval of its own people, has been so well and so long recognized that it has become in the minds of the people an unalienable right, a part of their civic and political existence. Integration by force annuls these rights and is one of the hurdles that must be overcome to make it acceptable without protest. And when the general public fully realize that amalgamation of necessity will follow the protest will become even more vigorous and violent from both races.

#### RACIAL INTEGRITY IN HISTORY

Racial integrity is a God-given right that has served civilization on two great historic occasions.

The Hebrew and the Egyptian lived side by side along the Nile in the land of Egypt for 400 years and preserved their racial integrity. Moses became prominent in the land of Egypt, commanded the army which expelled the Ethiopian from the country and in making peace he married Tharbis, the daughter of the Ethiopian king. Tharbis either died or returned to her native Ethiopia, but long after Aaron and Miriam, the brother and sister of Moses, spoke derogatorily of his having married an Ethiopian woman though she was the daughter of a king.

This matter might seem insignificant, but the controversy shows that Aaron and Miriam expected their race to stay pure and they didn't approve the Ethiopian marriage. If the Ethio-

pians or even the Egyptians and the Hebrews had integrated and amalgamated during these 400 years there would never have been an exodus. There would never have been Ten Commandments handed down to their leader from Mt. Sinai. There would never have been a Jewish religion that survived to be the parent of Christianity. The racial integrity of the Hebrew gave us the Old Testament, the Law and the Prophets and without which it would not have been. Who would even though he could turn back the pages of history and destroy a civilization that gave to the world the Ten Commandments and the people that first observed them and kept them secure in the Ark of the Covenant as a guide for the generations to come?

But another threat of integration by force more terrific than the first now confronted these people. It came to them more than a thousand years later. When Alexander the Great had conquered the Persian Empire and died his four generals divided the spoils and set up kingdoms for themselves. Egypt passed to the Greek house of Ptolemy. The core of the old Persian Empire passed to Antiochus. His realm included the ancient lands of Assyria, of Babylonia, of Persia, of Media, of Phoenicia, of Syria, of Arabia, Palestine and others. He built him a great city which he named Antioch. He conceived the idea of Hellenizing the people of all of his consolidated kingdoms, and he issued the decree that they should have one tongue, one religion and that that should be the Greek language, literature and government. First Maccabees, Chapters 1 and 2. He succeeded to the extent that even the New Testament some time after was written in the Greek language. But when he undertook to force the people of Judea into abandoning their religion and the traditions of Abraham and the law of Moses a resolute group headed by Judas Maccabeus, his brothers and nephews, presented an organized resistance. The army of the great empire of Antiochus came down upon them. Judas Maccabeus showed himself to be a general of the Stonewall Jackson type. He defeated the army of the Greek-Syrian empire. He defeated the next army and the next. He and his brothers and his nephews taking and assuming the title of the high priest instead of calling themselves kings or emperors restored their rule over the land almost to the extent of the ancient empire of Solomon and David. Among their most enduring work was the establishment of a colony on the shores of Lake Galilee. In this

colony Jesus Christ preached His Sermon on the Mount. He performed His first miracle at Cana when he turned the water into wine. In this colony He chose His twelve disciples. These disciples spread the doctrine of love and peace and good will toward men throughout the universe and gave us Christian civilization.

Had Antiochus succeeded in forcing integration and amalgamation on the peoples of his empire and particularly on Palestine, there would have been no New Testament. There would have been no Christian civilization. We have before us in the pages of history the countries that have amalgamated and their present status, the peoples who refused to amalgamate and the ideals and concepts that they have bequeathed to the civilized world.

*[Washington Speech]*

Again we refer to the wisdom of Booker Washington. In his speech at Wiley University delivered some more than 40 years ago he portrayed a racial relationship that had been in existence then since Reconstruction and has continued on down to the present era. He had a large Negro audience and there were many influential whites to listen. Said he, there is not a Negro in all the Southland who hasn't already picked out some influential white neighbor or citizen to whom he expects to go if he should get in trouble. And when he puts his hat under his arm and approaches this white friend he gets what he came for whether it be a counsellor, an adviser or if need be a champion. It was this thought that Garfield had in mind when he said his idea of a school was the boy and the professor sitting together on a log. For this period from the end of the tragic era of Reconstruction down to this date, a period of approximately 80 years, the Garfield idea and the Booker Washington thought has guided the colored race of the South. The influential white man was his leader and the colored man was the boy or his ward and friend.

The Negro early showed the ability and power of discrimination. He recognized the man that was able to do things. He recognized the man of influence. He perhaps sought out the son of his former master. If not, then the son of some other man's former master and laid before him his case. He got sound and disinterested advice. And it tended to make the two races interdependent as it were upon the other. It was at least an outstanding attempt of racial coexistence. The

Southern Negro feels kindly to his white neighbor and that feeling is fully reciprocated. Under the guidance and leadership of this influential white neighbor the Southern Negro is freer from wrongdoing than his brethren who have strayed into other fields.

INTEGRATION WITHOUT LOCAL APPROVAL

Even with efforts made in good faith national integration by force may not after all integrate the races.

National prohibition did not prohibit and the 18th Amendment had to be repealed.

We are fully conscious under the Brown decision that it is the duty of the school board and the duty of the court to throw no blocks in the way of an ultimate integration, but in doing this we think that a reading between the lines of the Brown decision, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, implies that the integration shall be so guided by local authorities as to accomplish the least confusion and injury to the education of the schools, and certainly not be carried to the extent of creating confusion and disorganization.

We consider the effort as an experiment although it may be as Herbert Hoover called it, a noble experiment yet to be tried.

The effort of the District of Columbia holds out little encouragement. There integration has been on trial for some four or five years during which time the colored enrollment has increased by 31,000 pupils and the white enrollment has decreased 17,000. Taking individual schools of the District of Columbia we note the change. At the beginning of integration the Roosevelt High School enrolled 634 whites and 518 Negroes. In 1959 the enrollment was 56 whites and 887 Negroes. In the McFarlin Junior High School at the beginning of integration there were 646 whites and 641 Negroes. In 1959 there were 106 whites and 1,217 Negroes. With the beginning of integration the Bennings School had 218 Negro students and 132 whites. In the last enrollment there were 628 Negroes and only 6 whites.

In the Davis School at the beginning of integration there were 139 Negroes and 589 whites. The last enrollment of the Davis School was changed to 1,078 Negroes and only 12 whites.

Fifty-eight schools grouped at the beginning of integration were 98 per cent colored. Integration has been in effect almost five years and these same 58 schools have 36,138 colored students and only 599 white.



An important thought to be carefully weighed is that the rapid readjustment of the school enrollment can hardly take place without creating confusion and loss to the students' advancement. Take the Davis School for instance and each year there would be 100 less white and 100 more Negroes, the student body constantly changing. Another noteworthy fact is that since integration in the schools 142,000 white people between the ages of 18 and 45 have moved from the District of Columbia, largely of course into Maryland and Virginia.

#### [Role of Placement]

The District of Columbia does not by any formal legislative enactment provide for the placement or transfer of pupils from school to school, but it is difficult for any school management to deny this privilege. And in fact such law has been upheld by our courts. *Carson v. Warlick*, 4 Cir., 238 F.2d 724; *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, D.C., 162 F. Supp. 372 affirmed by per curiam opinion 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed. 2d 145. This right of transfer and placement of students has resulted in the transfer of whites from school to school and blacks from school to school until in many schools integration is now practically nonexistent. Certain schools in the upper corner of the District are almost entirely white and the vast majority of the balance of the schools are becoming almost black.

To keep a school integrated without the approval of the parents and students is more or less like withholding the law of gravity, for water will seek its level. And although they may have the law, sooner or later the blacks will be together and the whites together. And though we may enact integration here in Dallas the school authorities can scarcely deny a petition for transfer and we may soon find the black schools all substantially black and the white schools substantially white. But in the midst of this trial and experiment the cause of education is bound to suffer.

The present problem could be solved by application of Governor Roosevelt's conception of local self-government which is now not possible under the Brown decision. We have had this local self-government in which the races here at Dallas have been given equal opportunities for more than 60 years. Local self-government therefore as a remedy is denied.

Then we come to the Booker Washington formula of solving the problem by the *excellence* of the individual which is one of the most rational of all plans. The instantaneous integration by force does not leave possible the achievement of the individual by the rule of *excellence* or excelling the other fellow.

#### [Third Formula]

A third formula is suggested by the theory of Thomas Jefferson and the lifetime slogan of Woodrow Wilson: Rule by consent of the governed. Here we think is the only formula that should be used until integration is fully tried.

One plan suggested is the integration by degrees starting in grade 1 and then in grade 2, 3, etc., in successive years. In this way in 12 years there would be complete integration. One advantage of this course would be a probable lessening of conflict and discord among the larger students. In this manner certain schools in Washington according to their teachers often called police to help hold order. Such procedure would be averted by this plan if put in effect. There will however almost certainly arise a problem by this plan that is bound to defeat it as the years progress and that is in the language of Dr. Nevins: amalgamation will inevitably follow, and in 12 years adult pupils will be channeled together. An old sage once remarked that your children will marry whomever they associate with and our army life is proving that fact. Almost constantly we naturalize the wives of soldiers in the American army which has been distributed almost around the globe and these wives come from almost every clime and every race. Not many Negroes have come but manifestly our Negro soldiers abroad have married white women and under competent advice no doubt they have taken their wives to states that allow intermarriage.

This plan of starting with the lower grade and in 12 years completing the integration is in all probability the most direct and surest route to amalgamation which in the long run is the most objectionable of all features of integration.

#### INTEGRATION RUSHES ON TO AMALGAMATION

There are those who feel that integration can be without the amalgamation of the two races and who would favor integration but do not look with favor upon amalgamation.

A well-recognized author has said: "Two currents cannot flow side by side down through the centuries without ultimately becoming one."

Since most of the whites in the South desire to maintain their racial integrity, they would for that reason alone oppose integration in the schools. Dr. Allen Nevins, historian and author, winner of the Pulitzer Prize and for 30 years professor of history at Columbia University on this subject says:

"At first the fusion will be imperceptible; then it will be perceptible but slow; then it will move with a rush.

"I could cite a dozen analogies from history to prove that such a process is inexorable, irresistible.

"Any sociologist could cite a dozen reasons why it is inevitable."

The white Southerner is proud of the fact that he has many Negro citizens among his neighbors who also have racial pride and do not look forward with any special desire to amalgamation of the two races. But an integration in the school-room taking the small child in grade 1 on up until he finishes high school places the current side by side in a closer channel than it has heretofore been.

Fear shapes the thought of people and has through the ages. The fears and apprehensions of a people cannot be overlooked. The Anglo-Saxon race anywhere it is found like the Jewish race favors racial integrity. And this is true of many of the Negro race. Any people that so believe and insist upon such has the right and a privilege of passing racial purity to future generations.<sup>2</sup> It is the belief of many thousands, no

2. No one recognized better than President Lincoln, the emancipator, the problem of the two races.

In an address to a large delegation of Negroes who were already free, August 14, 1862, when a measure was being considered of aiding the Negroes who wanted to go to other countries, particularly to Liberia in Africa, Mr. Lincoln made the following observation to the assembled group:

"You and we are different races. We have between us a broader difference than exists between almost any other two races. Whether it be right or wrong, I need not discuss, but this physical difference is a great disadvantage to us both, \* \* \* it is better for us both therefore to be separated."

It will be remembered that President Monroe and Francis Scott Key and others interested themselves in forming a settlement of the free Negroes of America on the African coast. The little nation of Liberia is the result, the capital, Monrovia, being named for President Monroe. The war interrupted the program although Mr. Lincoln apparently

doubt the vast majority of the people in the Southern States, that racial integration will be followed by racial amalgamation. And in this particular they look for precedents, precedents that show that such has not helped either race.

### [Racial Integrity]

Take Southern Europe and Northern Europe. In Northern Europe the different tribes and nationalities have married and inbred into their own tribes and kindred tribes—what the cattleman would call line breeding which makes purity of race. In breeding a cow by line breeding and care you create a valuable animal, sometimes worth thousands of dollars. So line breeding if racial integrity is to be preserved is something to be protected. In Southern Europe instead of line breeding there has been cross breeding. During the days of Roman power her conquering armies brought in many captured people and made slaves of them, but they didn't stop with that. They sent expeditions into Africa and Asia to catch and kidnap large numbers and subject them to slavery. Myers' Historic Series says that they virtually depopulated vast areas, took the people without their consent and subjected them to slavery. These slaves became so numerous in Southern Europe, particularly in Southern Italy, that one owner would sometimes possess 20,000 slaves. These slaves rebelled at their condition, but Roman armies would be sent to suppress them. When the Roman military power collapsed the slaves were left to their own initiative. They integrated, intermarried and produced an elaborate system of cross breeding.

Those who favor racial integrity do not look with favor upon the result. We do not say that the people of Sicily and the fringes of the Mediterranean are not equal to the people of the northern belt of the continent, but we do say that they are not superior. We will not adopt the appraisal of Lord Nelson nor will we refer to the unkind terms, because these people too have made their place under the sun, but we do say that they have not surpassed in any way the Finns, the Swedes, the Danes, the Scots or the other racial tribes of the northern belts.

· favored it. Had it been carried out we would have seen perhaps more than 50 years ago a great English speaking government of black men in Africa, the descendants of former American slaves. The point is that Mr. Lincoln recognized the problem of handling the question in no better way than separation.

## INTEGRATION BY CONSENT

Thomas Jefferson, Woodrow Wilson and all the great writers and champions of free government have emphasized government by consent of the governed. If we must have integration, then instead of having it by force may it not be by consent.

We have those among the whites of our City of Dallas who favor integration and are fairly enthusiastic in favor of it. That number is not so great, but they are here. We have some of our Negroes who are being used and are in good faith no doubt plaintiffs in this litigation. We don't think they represent a majority of the Negro population. But let's give integration in Dallas a chance that it is not having elsewhere.

Some educator has advanced the following plan which has an appeal: That the school authorities set aside schools within the city limits in which all those of either race who desire integration may be enrolled by placement arrangement and transportation given them to that school and that other like schools for different grades be set aside maybe elsewhere in the city. Since the children would be there together by their parents' consent there is at last one reason why good will would prevail in these schools that might not prevail in schools where children are brought together by force and without the approval of their parents.

If the plan proved popular, then additional integrated schools would through the years follow, not more than 12 years.

This plan would not put Dallas in the attitude or in the same channel that the District of Co-

lumbia has been going through and yet it would give a test of the success or failure of integration. There is at present a good feeling among the two races in Dallas, somewhat impaired by the recent agitation over the nation, but we have not so far had any open eruption and good will is perhaps here to a better degree than at many other places.

If the end of integration is so desirable, then why not do it in the way that our fathers had in mind when they gave us law by consent of the parties affected?

In view of the fact that the plan submitted by the Board will manifestly lead to an amalgamation of the races and as this becomes more apparent that children will be transferred out of mixed schools either to white schools or to black schools as has been the experience in the District of Columbia, we feel that the School Board should give its plan some further consideration and we will postpone this further hearing for 20 days, up until the 14th of June, to give the Board an opportunity to work out a plan or program leading to integration that will not provoke a general shifting and transfer of the student body among the schools and one that will not lead to the amalgamation of the two races which is undesirable. Another plan might be by starting in certain wards and spreading it gradually rather than starting in grade 1 over the whole city and gradually up the grades.

We are deeply conscious that you have a greater problem than one which may appear to the onlooker.

May an all-wise Creator guide you.

## Supplemental Opinion of June 4, 1960

On this the 4th day of June, 1960, there came on to be further considered in Cause No. 6165 the case of Hilda Ruth Borders et al. v. Dr. Edwin L. Rippey et al., being known as the school integration case.

The plaintiffs have filed a contest on the amended plan of the School Board. The School Board has replied, Sections 2 and 3 thereof reading as follows, which is very much in line with the Court's thinking on this subject:

"Sec. 2. They are strongly of the opinion and belief that a great many of the parents and children in the District are vigorously opposed to wholesale and complete integra-

tion, although practically all (defendants sincerely hope and trust) are determined to follow the law as laid down by the Courts, and certainly the defendants are so moved; and such parties who are thus opposed to full integration would probably commend a plan whereby those who desire to integrate may do so, and those who are opposed might not be forced to do so. That all parents, and pupils will be canvassed and surveyed for the purpose of learning who does and who does not want integration, and thereby give all concerned what they prefer, as far as is practical and possible.

"Sec. 3. By such Plan No. 2 as set out in Exhibit 'A', the children would come together without any animus, prejudice, and bias, and the likelihood of violence would be practically eliminated, while otherwise forced sweeping integration in one or more grades under duress and force might be met with violent opposition; and if violence should develop, all the disadvantages experienced in Little Rock and elsewhere might occur in Dallas. Voluntary acceptance and cooperation on the part of teachers, parents and pupils offers the best probable means to avoid this undesirable result. Carried out in this manner, it offers the best way of giving to all what each person may think is best for himself."

Since writing our former opinion we would supplement it with these following suggestions:

A complete review of the authorities bearing on this question must ultimately lead to a clearer understanding of the law and the relative fields of the school authorities and the courts. The courts all the way up and down will of necessity, under the terms of the Fourteenth Amendment as interpreted by and in the Brown decision, be limited to the mandate calling for integration. Beyond that school management will be left entirely to the school authorities.

A white school board may not refuse a colored child the right to enroll among pupils of the white race, but our judgment is that the courts will not interfere with the arrangements of the schools so long as there is due respect for the orders of integration. And the court will not direct the school board as to what school the child may attend if the board thinks that an allocation would be helpful to the school system and even to the child himself in certain cases.

#### *[Concepts Borne Out]*

We think that these concepts are borne out in particular by certain decisions already written.

In *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, D.C. 1958, 162 F.Supp. 372, 384, affirmed 1958, 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145, the Court held the constitutional administration of state school laws does not rest with the courts, but "the responsibility rests primarily upon the local school boards \* \* \*."

In this case the court regarded the following criteria as constitutionally approved in determining pupil placement:

"In the assignment, transfer or continuance of pupils among and within the schools or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil as well as other relevant matters; available room and teaching capacity in the various schools; the availability of transportation; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for the particular pupil; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and association involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards in a particular school; the physical effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill-will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interest of the pupil, the moral conduct, health and personal standards of the pupil; the request or consent of parents or guardian and the reason assigned therefor."

In *Carson v. Warlick*, 4 Cir., 1956, 238 F.2d 724, 728, Chief Judge Parker said:

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which



the Constitution forbids. Not until they have applied to and have failed to give relief should the courts be asked to interfere in school administration."

In this case Judge Parker approved the following standards in the North Carolina Pupil Enrollment Act, G.S.N.C. § 115-177:

Pupils shall be enrolled "so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils."

The School Board would bear in mind that the judge of this court acts with them more in an advisory capacity than in a mandatory degree. His rulings will disagree with the School Board only when they transgress the orders of the law as interpreted by the courts. He did not agree to the plan originally advanced of integrating only with grade 1. One reason therefor would be that the plaintiffs in the case were already past grade 1 which would amount to a total denial of their plea. The plan that you now propose would enable them to have integration in their school days.

We are conscious that when a change in the school system is so sweeping and revolutionary in its character for it to set aside the constitution of even the State of Texas that you may as a School Board feel somewhat uncertain not only as to your duties but as to the privileges allowed you by the law. The School Board has able attorneys which can advise you. I will say to the credit of the members of this Board and also to the plaintiffs that neither side has ever approached the Court or made any suggestion to him as to what his ruling should be.

#### *[In Charge of Schools]*

As a School Board you are still in charge of the schools to arrange and operate them as you have always done with one notable change: You can make no discrimination between children because of their race or color.

I call your attention therefore to some things that you may not do and then to some that you may do.

1. You cannot refuse to enroll a colored child like the plaintiff in this case if she offers to be enrolled in a white school. No pupil, however, may select the school that he would attend.

2. You cannot refuse a white child offering to be enrolled in a black school, because the law will work both ways.

3. You cannot do as you would prefer to do, but you must do as the law commands you to do.

4. You cannot because of race or color discriminate between children.

5. You will not go out and draft or force children of either race to come in and be integrated. They must offer and ask.

On the other hand:

1. You may in the operation of your schools assign the school to the child which is best suited under all the circumstances, taking into consideration only the things that are best for the child and at the same time the best interest of the entire school system.

2. A white child that makes himself obnoxious in an integrated school may be under the law of placement put in another school to avoid trouble.

3. So may an obnoxious or disagreeable Negro child be removed from an integrated school in order to avoid trouble.

4. Without purposely and intentionally discriminating between the races you may for any good cause or reason assign pupils to schools other than that nearest to them. Thus, to illustrate, if some pampered white boy, growing up without ever having been controlled or denied, enters an integrated school and by reason of his selfish propensities, pride or vanity or racial dislike creates disturbance he may be transferred to another school. Likewise, if an overgrown Negro boy in an integrated school should be by premature growth inclined to sex and should write verses on the blackboard of an obscene character designedly for the white girls to read or should make improper approaches to them so as to provoke trouble in the school, he should be assigned to a school where the situation is different.

#### *[Precautionary Measures]*

These precautionary measures are allowed under the law of placement for the well-being of the entire system.

Not only in our schools but in our entire public relations should the two races be tolerant of each other and when exasperated from something that ought not to have happened just to consider something that's good. Just in the last few days, for instance, we have noted in the press dispatches where Joe Louis, former world

heavyweight champion, was invited to participate in an organization which would aid in assembling and conducting Negro tourists to Havana, Cuba. This purpose may have been not only to bring some money to Cuba, but to give the visitors a touch with the communistic system of government in Cuba. Joe Louis having his attention called to that said if this was the purpose of it, then he would have nothing to do with it, as he was not ready to give up his American citizenship and the freedom of its institutions.

We can likewise think of the Negro woman who as foreman of a jury convicted the 11 communists in New York City. And there is no occasion anywhere among any people that there might not be something pleasing considered.

We think that the system you have adopted will not only produce or at least help to secure peace and good will in the school system of Dallas, but will inaugurate a system that will stand the test of the law.

## Defendants' Second Amended Supplemental Answer

TO SAID HONORABLE COURT:

COME NOW the Defendants and file this their Second Amended Supplemental Answer for the purpose of submitting an alternate plan for integration, pursuant to the directive of this Honorable Court, and for such say:

### 1.

That the policy of the Defendants has always been and still is to follow the laws of the jurisdictions to which they are subject, and while they still believe that the plan set out in Exhibit 1 attached to Defendants' First Supplemental Answer is the best possible plan for integration, they willingly submit an alternate plan, designated Plan No. 2, which is set out in Exhibit "A" attached hereto and made a part hereof.

### 2.

They are strongly of the opinion and belief that a great many of the parents and children in the District are vigorously opposed to wholesale and complete integration, although practically all (defendants sincerely hope and trust) are determined to follow the law as laid down by the Courts, and certainly the defendants are so moved; and such parties who are thus opposed to full integration would probably commend a plan whereby those who desire to integrate may do so, and those who are opposed might not be forced to do so. That all parents, and pupils will be canvassed and surveyed for the purpose of learning who does and who does not want integration, and thereby give all concerned what they prefer, as far as is practical and possible.

### 3.

By such Plan No. 2 as set out in Exhibit "A", the children would come together without any animus, prejudice, and bias, and the likelihood of violence would be practically eliminated, while otherwise forced sweeping integration in one or more grades under duress and force might be met with violent opposition; and if violence should develop, all the disadvantages experienced in Little Rock and elsewhere might occur in Dallas. Voluntary acceptance and cooperation on the part of teachers, parents and pupils offers the best probable means to avoid this undesirable result. Carried out in this manner, it offers the best way of giving to all what each person may think is best for himself.

### 4.

Plan No. 2 would also probably reduce to a minimum dining room, playground and toilet problems; it also would result in a psychological advantage to Negro children, in that they would be in school where all students are there by choice, whether they be white or colored, and the Negro children would not be met with sullen rejection beginning at the moment they enrolled, as has been the case in a number of places with forced integration. It should also reduce or preclude the prospects for further litigation, in that there would not be any litigants who could show damage, injury or even any equitable interest in any petition for relief.

### 5.

Defendants desire and hereby amend their plan as set out in "Exhibit 1" to Defendants'

First Supplemental Answer, by adding the following:

#1a. The conditions stated above with reference to Article 2900-a, V.A.C.S., and the holding of a favorable vote thereunder, assumes the validity and constitutionality of said Statute, and if it be held to the contrary by any court of competent jurisdiction, then the holding of such

election will no longer be a condition of this plan.

Respectfully submitted,  
H. W. STRASBURGER  
300 Gulf States Building  
Dallas 1, Texas  
Attorney for Defendants.

## Board Resolution

BE IT RESOLVED by the Board of Education of the Dallas Independent School District, pursuant to the opinion and judgment by the U.S. District Court for the Northern District of Texas, Dallas Division, Judge T. Whitfield Davidson presiding, handed down on May, 25, 1960, an alternate plan for the desegregation of schools within the District be approved as herein set out.

BE IT FURTHER RESOLVED that the following alternate plan be approved, said plan to take effect initially as of September 1, 1961:

### PLAN NO. 2 DESEGREGATION

1. Beginning in September, 1961, conditioned upon the calling and the favorable results of an election in accordance with H.B. 65 (Article 2900-a, V.A.C.S.), as set out in Defendants' first plan, a sufficient number of schools shall be designated by the School District and set aside as may be necessary to take care of all pupils and parents who desire integration. Thereby a sufficient number of schools will be fully integrated to serve such pupils and parents.
2. The conditions stated above with reference to Article 2900-a, V.A.C.S., and the holding of a favorable vote thereunder assumes the validity and constitutionality of said Statute, and if it be held to the contrary by any court of competent jurisdiction, then the holding of such election will no longer be a condition of this plan.
3. All parents and pupils will be canvassed and surveyed for the purpose of determining those who want and those who do not want integration. They will have the choice of attending either a school designated for their particular race or an integrated school.
4. The reassignment of the 152 schools and the attendance districts served by each of them accommodate separating and grouping into white, Negro, and mixed schools, and to utilize efficiently and fully the space available to accommodate the pupil load of this School District, will require careful study, meticulous planning, and the application of good principles of logistics, to the end that the children will be most conveniently and satisfactorily housed for instructional purposes.
5. Orientation of teachers with respect to dealing with and teaching the children of different races and of different sociological backgrounds all in the same classroom requires meticulous preparation. Numerous clinics, work shops, seminars, and joint study groups must be pursued during the year 1960-61 and in succeeding years to bring about a state of amity and congeniality for these new assignments.
6. Likewise, orientation of teachers with respect to the educational processes of teaching children who have different degrees of ability levels and achievements in the same classrooms will be one of our endeavors. Tolerance and understanding are involved in this undertaking.
7. Time and preparation will be required for conditioning teachers to the communication involvements with mixed groups. Both white and Negro teachers will require a period of anticipation after the plan for desegregation is approved and announced. During this period a way of thinking will be developed so as to minimize the risks and embarrassments for both races. The conditioning effort anticipated will amount to development in ways of thinking and doing which will cause teachers and pupils to be

agreeable to one another while working together, both through desire and in their many automatic responses.

8. Parents and parent organizations will require orientation where mixed groups will come about as a result of desegregation.
9. As one of the means of bringing about these ends outlined, we shall start a program of orientation in September, 1960, among the children and parents concerned with desegregated classes in the Fall of 1961. It is highly important that these first desegregated classes be successful organizations. Only in such organizations can profitable teaching be carried on. The parents and the children of both races will require this orientation. Each year these orientation programs will continue.
10. In years past, teachers meetings and convocations within the District have been on a segregated basis. Beginning in September, 1960, bi-racial convocations, bi-racial teachers meetings, bi-racial seminars, and bi-racial study groups will be organized to prepare white and Negro teachers to accept each other on a professional level, to the end that the working for common goals in the education of the children of Dallas will be harmoniously projected.

To accomplish the purpose and program outlined above is a monumental task, and the least possible time which will permit of effective accomplishments will require that desegregation not be attempted before September 1, 1961. To implement effectively the successful accomplishment of the plan above, the administrative officers of the School District have prepared a calendar of preparatory steps as set out in Exhibit "A", attached hereto and made a part hereof.

#### DESEGREGATION PLAN Exhibit A

##### 1. Convocations

For the first time, in 1960-61 convocations for both white and Negro personnel will be held in the same meeting place. These convocations will involve 4800 individuals. In these meetings the Superintendent of Schools brings to the personnel plans, philosophy, procedures, and operating policies for the School District. The

Municipal Auditorium has been retained for these dates:

September 17, 1960

April 29, 1961

##### 2. Curriculum Council

The functions of the Curriculum Council, to be composed of representative teachers, principals, and supervisors from elementary, junior high, and senior high schools of both races, will evaluate curriculum and instructional procedures.

It is the announced policy of this School District to have no watering down or dilution of courses and curricula. However, a very real problem exists because of the three years variation in aptitude and performance of like-age children between the two races. It will, therefore, be necessary to study ways and means of classification and assignment of children so as to achieve a condition and a climate for teaching and learning. Meeting dates for the District-wide Council will be:

September 13, 1960

October 11, 1960

November 8, 1960

December 13, 1960

January 10, 1961

February 14, 1961

March 14, 1961

April 11, 1961

May 9, 1961

Numerous subcommittee meetings will grow out of these Council meetings.

##### 3. Seminars for Classroom Teachers

Since a great deal of time will be required for teachers to become conditioned in their involvements with mixed groups, seminars will be organized on a bi-racial basis. In these seminars a way of thinking will be developed so as to lessen the risk of embarrassment of both races. This anticipated effort will result in ways of thinking and doing which will cause teachers and pupils of both races to be agreeable to each other while working together in their duties and in their many automatic responses. These seminars will be on a district-wide basis according to this calendar:

Seminar No. 1-1960

September 26, 29

October 10, 13, 17, 20, 24, 27



November 7, 10, 14, 17, 21, 24, 28  
 December 1  
*Seminar No. 2—1960-61*  
 December 5, 8, 12, 15, 19  
 January 9, 12, 16, 19, 23, 26, 30  
 February 2, 6, 9, 13  
*Seminar No. 3—1961*  
 February 20, 23, 27  
 March 2, 6, 9, 13, 16, 20, 23, 27, 30  
 April 6, 10, 13, 17

#### 4. Principal, Teacher, and Staff Meetings

Principals, teachers, and staff members will be required to join in a common study to prepare themselves and their students for the desegregated instructional pattern in the offing. The following calendar for these meetings is established:

September 8, 1960  
 September 22, 1960  
 October 4, 1960  
 November 1, 1960  
 December 6, 1960  
 January 3, 1961  
 February 7, 1961  
 March 7, 1961  
 April 4, 1961  
 May 2, 1961

#### 5. Methods of Teaching

Methods of teaching will be studied by city-wide bi-racial committees and in individual buildings throughout the District. Committees of teachers, principals, and staff members will be appointed to participate in this study, making reports to the supervisory and instructional officials of the School System to the end that efficiency may be preserved in the classrooms of the District. The committee meetings on a District-wide basis will be held on these days:

September 26, 1960  
 October 17, 1960  
 November 21, 1960  
 December 19, 1960  
 January 23, 1961  
 February 20, 1961  
 March 20, 1961  
 April 24, 1961  
 May 15, 1961

Necessarily, hundreds of teachers and principals not on the Central Committee will also be formed into subcommittees

and will have numerous meetings on succeeding dates.

#### 6. Community Observance of Education

Each year in November and again in March the citizens of the Dallas Independent School District observe "American Education Week" and "Texas Public Schools Week." In order that the new viewpoint for this District-wide observance may be better understood, committee meetings of staff members, teachers, and representatives of the Parent-Teacher Associations of both races and bi-racially must be held in the fall and early spring. These meetings will involve thousands of people. Dates for these over-all policy meetings will be:

September 15, 1960  
 October 13, 1960  
 December 8, 1960  
 January 11, 1961  
 February 2, 1961

#### 7. Information and Liaison on a Community-Wide Basis

The news and informational institutions such as newspapers, radio and television stations, the many organizations devoted to community betterment and the promulgation of information on a community-wide basis, the allied organizations dedicated to the growth and security of youth, and the character-building institutions, will all be called into service to secure a community front of solidarity in a successful operation of gradual desegregation in the School District.

#### 8. Preschool Children and Parents

Throughout the year 1960-61, facing such a radical departure from present conditions in the community, we shall find it necessary for principals and teachers to work with the beginning children for 1961 and with their parents with a view to acclimating them to a friendly association in desegregated classrooms. These meetings will be held monthly following the opening of school (September 7, 1960).

Necessarily, numerous bi-racial subcommittee meetings composed of additional teachers, supervisors, principals, and parents will be held following these district-

wide conferences. This same plan of conditioning the children and parents in succeeding grades to be desegregated from year to year will be followed.

9. Parent-Teacher Associations

Within the Dallas Independent School District are two groups of parent-teacher organizations: (1) a white group; (2) a Negro group. Each organization has its central body known as the Dallas Council of Parents and Teachers. There are also Dads Clubs of both races. Definite liaison must be established between these two racial groups with a view to lessening the shock and likelihood of misunderstanding on the part of parents as the School System approaches desegregation. To ac-

complish this purpose, the School Administration is proposing the following calendar for a joint study of representatives of the two organizations:

September 19, 1960

October 10, 1960

November 14, 1960

December 12, 1960

January 16, 1961

February 13, 1961

March 13, 1961

April 17, 1961

May 15, 1961

10. Each succeeding year a similar calendar of meetings, study groups, seminars, and professional activities will be continued.

## EDUCATION

### Public Schools—Texas

**Delores ROSS and Beneva Delois Williams et al. v. Dr. Henry A. PETERSON, as President of the Board of Trustees of the Houston Independent School District et al.**

United States District Court, Southern District, Texas, Houston Division, August 3, 12, 1960, Civil Action No. 10,444.

**HOUSTON INDEPENDENT SCHOOL DISTRICT et al. v. Delores ROSS, a Minor, by her mother and next friend, Mary Alice Benjamin et al.**

United States Court of Appeals, Fifth Circuit, August 26, September 6, 1960, 282 F.2d 95.

**SUMMARY:** A federal court suit, brought in 1956 by Negro children in Houston, Texas, resulted in a 1957 judgment declaring state statutory and constitutional requirements of racial segregation in public schools unconstitutional and ordering defendant city school officials to admit plaintiffs to schools without regard to race "with all deliberate speed," but without fixing a definite time for desegregation. *Ross v. Rogers*, 2 Race Rel. L. Rep. 1114 (S.D. Tex. 1957). In May, 1959, plaintiffs moved that the defendant board of education be ordered forthwith to desegregate, following which the court directed the board to file a progress report and a desegregation plan. The board replied several months later that it was still confronted with many problems and had no concrete proposal as to when it would begin to effectuate any desegregation plan. The court notified defendants' counsel that the reply was inadequate; that it was the board's responsibility, and not the court's, to propose a plan; and that, if the board refused to do so, the court would grant the injunctive relief requested by the plaintiffs—enforcing by court decree complete integration. On April 8, 1960, the court notified defendants that a plan must be approved by the board and filed with the court by June 1, 1960. On June 1, the board filed an "area-system" plan (referred to in the press as a "salt and pepper" plan) proposing that effective in September 1, 1961, one elementary school, one junior high school, and one senior high school would be open to voluntary integration, all of which would be within a single area of the city to be selected after

studying the results of a city-wide referendum election to be held on June 4, 1960. The plan provided that those living in that area who do not desire to attend an integrated school would be allowed to transfer to schools outside the area, and that before being allowed to attend an integrated school each child desiring to do so would be required to confer with the principal of the school he presently attends, who would decide by "non-discriminatory criteria" whether it is "desirable" for the child to transfer to a school of predominantly different color. Also, before transferring to an integrated school, a child would have to be tested "to assure proper grade level achievements" and secure a medical examination from a doctor selected by the board; but no child with a disciplinary problem, a disciplinary school record, or a juvenile record would be eligible to attend an integrated school. The June 4 referendum, according to newspaper reports, resulted in a vote of 57,596 against, and 28,860 for, integrated schools. On August 3, the court stated its finding that the plan did not constitute compliance, nor a good faith attempt at compliance, with its previous order, terming it a "palpable sham and subterfuge designed only to accomplish further evasion and delay." At the same time, the court ordered Houston schools to be desegregated at the rate of a grade a year, beginning with the first grade on September, 1960, but permitting transfers upon request and pursuant to reasonable rules adopted by school authorities so long as those rules do not make color or race a consideration. By an order of August 12, the court substituted certain individuals for others as defendants and detailed, year by year, how the gradual desegregation plan is to be executed. The Court of Appeals for the Fifth Circuit denied, on August 26, an application for a stay of the August 12 order. And an application for stay of judgment of the district court order was denied on September 1, by the United States Supreme Court. 81 S.Ct. 27, 5 Race Rel. L. Rep. 613, *supra* (1960). On appeal, the Court of Appeals on September 6 affirmed the August 12 order. In response to an inquiry by the state commissioner of education, the attorney general of Texas, also on September 6, issued an opinion to the effect that neither the Houston school board nor any other school authority had acted so as to "abolish the dual public school system" within the meaning of a statute adopted by the state legislature in 1957 [2 Race Rel. L. Rep. 695 (1957)] and that they were not, therefore, subject to the penalties provided in the statute for such action. On the evening of September 6, at a special meeting of the Houston school board, a motion was adopted that the city school superintendent "be instructed to receive all applications of those first-grade students of one race desiring to enter a school of the opposite race; that all applications be reviewed to determine whether or not they meet the requirements as established by this Board of Education, and that each such applicant be notified as to his placement not later than Friday, September 9, 1960." The various 1960 developments, beginning with the district court notice of April 8, are reproduced below in chronological order.

## Notice From Court of April 8

April 8, 1960

Mr. Joe H. Reynolds  
San Jacinto Building  
Houston 2, Texas

Mr. Weldon H. Berry  
810 Prairie  
Houston 2, Texas

re: C.A. No. 10,444-Houston Division, Delores  
Ross, et al. v. President of the Board of  
Trustees of the Houston Independent  
School Dist.

Gentlemen:

Reference is made to our several conversations

from time to time in the above styled action, and particularly with reference to our conference of some ten days ago. Following this last conference, Mr. Reynolds suggested that it would be advisable, in his judgment, if the results thereof were reduced to writing. I join in that thought, and by means of this letter review the developments.

You will recall that this action was filed in December, 1956. It came on for hearing in due course in May, 1957. The hearing lasted several days. At that time it was the position of the defendant Board that the said Board recognized its obligation to operate its school system on a

racially desegregated basis, and that the Board expected to do so; but that many problems of major magnitude made it difficult to do so at that time. I recall particularly testimony in this regard to the effect that a new construction program was then being undertaken, contemplating the erection of a number of new schools, all of which would take about two years. I recall further testimony that the Administrative Offices were making a census or survey of the scholastics within the system, with a view to redistricting; and it was anticipated that this would also take a year, or perhaps longer.

As a result of that hearing, an order was entered, by agreement of all parties, directing that the defendant Board should proceed with these plans, looking toward operation on a racially desegregated basis, without undue delay.

Some two years thereafter, in May, 1959, the plaintiffs moved for further relief. The motion called attention to the fact that some two years had elapsed, and sought that the Board be ordered forthwith to desegregate. The Court at that time directed that the Board file a report as to the progress which it had made in meeting its problems, and likewise file what plan or proposal it had adopted, or expected to adopt, looking to integration of the school system. Several months thereafter, the defendant Board filed a voluminous reply, the effect of which was to state that it was still confronted with many problems, and had no concrete proposal as to when it would begin to carry into effect any plan for desegregation.

In our conferences of last week, after reviewing the foregoing developments, I advised counsel that it appeared to the Court that the request for delay made in May, 1957, had been granted; and that the reply filed in the Summer or early Fall of 1959, I considered inadequate. I advised counsel further that I could only consider any requests for additional delay in filing some plan

or concrete proposal looking toward the operation on a desegregated basis as an indication of bad faith on the part of the defendant Board, and as indicating the intention on the part of the defendant Board indefinitely to continue the matter without expectation of making a bona fide effort to comply with the agreed order of 1957.

I further advised counsel that I drew the inference from the reply filed by the defendant Board in 1959 that the Board desired to avoid responsibility for adopting any plan of this nature, and was, in effect, stating to the Court that the Court could adopt and enforce any one of several plans which had been suggested by various interested parties. The Court advised counsel that the Court had no duty or desire to draft or adopt any particular plan or program of this nature; that it had been the policy of this Court to withhold the injunctive relief which the plaintiffs sought (namely, enforcing by Court decree complete integration) so long as the Board made a sincere and bona fide effort to pursue a plan looking to accomplishing this objective with a minimum of turmoil and discontent. I advised counsel further that in the event the Board declined to go forward with such plan, the Court had no alternative but to grant the relief which the plaintiffs have sought.

Following the discussions substantially as above, Mr. Reynolds advised me that he was of the view that the defendant Board expected to adopt and submit to the Court a plan looking to this end. I advised him that I would be glad to receive and consider it, and to have the advice of counsel for all parties with regard thereto.

So there may be no misunderstanding, I will fix June 1, 1960, as the date on which such plan must have been approved by the defendant Board, and filed with the Clerk of this Court.

Sincerely,

Ben C. Connally

United States District Judge

## Board's Desegregation Plan

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Houston Independent School District, Defendant in the above entitled and numbered cause, and in response to the order of this Court files this its Plan of Desegregation, providing for the admission to its schools all of

the scholastics within the Houston Independent School District on a racially non-discriminatory basis. This plan is filed in good faith compliance by this Defendant so as to comply with the orders of this Court. Attached hereto is "EXHIBIT A", which constitutes the Plan of Desegregation.



## I

This Defendant reasserts, and the pleadings of all parties conclusively show, that the school system maintained by this Defendant has at all times provided schools for colored children that are in no way inferior to the schools for the white children.

In submitting this Plan this Defendant refers the Court to all of the evidence, testimony and reports heretofore presented, which reflects the multitude of problems facing this Defendant in arriving at any plan of desegregation and the efforts made and being made to work a solution. Moreover, this Court knows that the Defendant, Houston Independent School District, is one of the largest school districts in the United States and it is the largest segregated school district in the United States. The scholastic population of this School District is approximately 170,000, and it covers many square miles of this community, and it consists of many school buildings. Apart from desegregation, this Defendant is confronted with major problems of administration which of necessity must be considered in any plan of desegregation. The plan here submitted is based upon years of experience, intimate knowledge of conditions and is the result of long study and profound reflection. It represents the best plan for all of the scholastics of the Houston Independent School District.

## II

In presenting this plan of desegregation in good faith this Defendant has considered all of the many problems of administration, together with the local conditions of the School District, and has relied upon well established legal principles established by court decisions involving segregation cases not limited to, but including, the following:

- a) "Cases involving desegregation, like other cases, depend largely upon the facts." *Kelley v. Board of Education of City of Nashville*, 270 F. 2d 209 (cert. den. 80 Sup. Ct. 293).
- b) "Because of the nature of the problems and local conditions, school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing." *Briggs v. Elliott*, D.C. 132 F.Supp. 776.
- c) "The Supreme Court of the United States has made it clear that adjustment must be

made in accordance with the exigencies of each case and that the concept of 'all deliberate speed' is a flexible one. For this reason, decisions applying to desegregation doctrine in other cities or areas where different conditions obtain are of little value. Local conditions call for the application of a local remedy." *Kelley, supra*.

- d) "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whenever the action of school authorities constitutes good faith implementation of the governing constitutional principles in fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility and shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Topeka*, 349 U.S. 294, 299.
- e) "Courts of equity may properly take into consideration the public interest in the elimination of such obstacles; that once a start is made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." *Brown, supra*.
- f) "It is not the business of the Federal Courts to operate the public schools and they should intervene only when it is necessary for the enforcement of rights protected by the Federal Constitution." *Kelley, supra*.
- g) "It would be an unwarranted invasion of the lawful prerogative of the legally constituted school authority if the court should undertake to set its judgment aside and substitute some other plan." *Kelley, supra*.
- h) "It has not been decided that the Federal Courts are to take over or regulate the public schools of the states." *Briggs, supra*.
- i) "It (Supreme Court) has not decided that the states must mix persons of different races in the schools or must require them to attend schools or deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains." *Briggs, supra*.
- j) "Nothing in the Constitution or in the decision of the Supreme Court takes away

from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation." *Briggs, supra*.

- k) "The question of speed (of desegregation) was to be decided with reference to existing local conditions." *Aaron v. Cooper*, 243 F. 2d 361, 363.
- l) "A reasonable amount of time to effect complete integration in certain places might be unreasonable in other places." *Aaron, supra*.
- m) "If the child is free to attend an integrated school and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parents may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear, or some kind of economic reprisal; or feeling that the child's life will be more harmonious with members of his own race. In common justice the choice should be a free choice uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents—it is the denial of the right to attend a non-segregated school that violates the child's constitutional right. It is the exclusion of children from such a school that generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Cooper v. Aaron*, 358 U.S. 1.
- n) "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they must not be prevented from intermingling or going to school together because of race or color." *Brown, supra*.

### III

It is respectfully submitted that the attached plan is consistent with the legal principles above considered. The plan logically solves the problem of subjective, psychological problems such as a "generated feeling of inferiority" which was of primary concern to the members of the United States Supreme Court in their decision

in *Brown v. Topeka*. The submitted plan further provides for the intermingling of those scholastics who desire it. The plan is elastic and can be enlarged so that all scholastics within this School District, colored or white, are guaranteed the constitutional rights given to them under *Brown v. Topeka*. The plan is a lateral rather than a vertical plan and provides a method whereby desegregation can be enlarged not on the basis of a given number of years, but rather on the basis of need and desire of the scholastics of this School District as the circumstances warrant.

It is respectfully submitted that this plan provides a program whereby all of the scholastics of this School District can receive an education on a racially non-discriminatory basis.

WHEREFORE, premises considered, Defendant prays that this Court accept the Plan of Desegregation of this Defendant and that this cause remain on the docket of this Court subject to additional hearings and orders.

Joe H. Reynolds  
Attorney for Defendant

### EXHIBIT "A"

WHEREAS, this School District has earnestly studied and considered the ways and means to commence desegregation consistent with *Brown v. Topeka*, which declares that "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating and solving these problems", and

WHEREAS, this School District, being required to abide by state law as well as the mandate of the Federal Courts has gone to great effort to bring about the referendum election to be held June 4th as required by state law, and the plan submitted hereinafter is subject to the laws of Texas as well as said Federal Court decision; and

WHEREAS, we believe that full implementation of desegregation, consistent with constitutional principles, can be best achieved for the benefit of all children (against the plaintiffs in *Delores Ross vs. H.I.S.D.*) on a plan whereby no forced integration will be required; and,

WHEREAS, the area-system plan stated hereinafter provides a means for increased desegregation as needed to guarantee constitutional rights to those desiring to attend desegregated schools; and

WHEREAS, we believe that this plan is best under all attendant circumstances for this School District, feeling that what other school districts in Texas may use is not always a proper criteria for this School District in view of local conditions existing here. However, this plan is similar in nearly all aspects to operations in other Texas schools now.

NOW, THEREFORE, BE IT RESOLVED, that the following plan of implementation be adopted by the Houston Independent School District.

#### "EXHIBIT A"

##### 1. SELECT SCHOOLS ON AN AREA-SYSTEM BASIS

a) This plan has as its purpose compliance with the order of the Federal District Court and provision for a program of no forced integration. No child will be forced to attend an integrated school.

b) Within the Houston Independent School District there are several school systems or school areas, according to designated boundaries, as those terms are used in respect to students and what school they attend commencing in the first grade and continuing through the 12th grade. That is to say, a student completing the work in a given elementary school normally goes to a designated Junior High School within the designated area, and upon completion of the work in the Junior High School normally goes to a designated Senior High School in such area. For all practical purposes this actually makes up a complete school system within the Houston Independent School Districts.

The plan submitted herewith would be to commence on September, 1961, a voluntary integration of one such system, permitting one elementary school, one junior high school and one senior high school to become completely integrated.

c) The results of the referendum election of June 4, 1960, plus further surveys herein mentioned as made by the administration of the Houston Independent School District will assist in determining the area selected. Those living in the area selected who do not desire to attend the integrated schools will be allowed to transfer elsewhere in the district.

Because this plan will require no forced integration, it will be necessary to determine the approximate number of white and colored students that will desire to enroll in the schools to be integrated. This information is necessary in

order for the administration to make the necessary arrangements. To obtain this information, a survey will be made of the parents of the colored and white students to determine those who wish to attend the integrated schools, as well as to determine those who desire to attend segregated schools only.

##### 2. EACH CHILD, COLORED OR WHITE, DESIRING TO ATTEND THE INTEGRATED SCHOOL, BEFORE BEING ALLOWED TO ATTEND SUCH SCHOOL MUST HAVE A CONFERENCE WITH THE PRINCIPAL OF THE SCHOOL WHICH THE STUDENT NOW ATTENDS.

Non-discriminatory criteria will be set up whereby that particular principal can judge and find as a fact whether or not it is desirable for the particular student to seek a transfer from the school of the principal to the school of the predominately different color.

a) After the principal has found as a fact that there is no reason, exclusive of race, why said student should not be transferred, the student shall then be individually tested by the regular testing teams of the District in order to assure the proper grade level achievements for the child prior to transfer.

b) In order for a student to transfer, such child, whether white or colored, must secure a medical examination from a doctor or committee of doctors as determined by the Board.

c) No child who has a disciplinary problem or a disciplinary school record, police record, or a juvenile record will be eligible to attend the integrated school.

##### 3. THE INTEGRATED SCHOOLS LOCATED IN THE AREA WILL BE OPEN SCHOOLS AVAILABLE TO BOTH WHITE AND COLORED STUDENTS WHO ARE ELIGIBLE TO ATTEND SUCH SCHOOLS ON THE BASIS HEREINABOVE OUTLINED.

##### 4. TEACHER PERSONNEL FOR THE INTEGRATED SCHOOLS WILL BE THE SAME PERSONNEL NOW TEACHING IN SUCH SCHOOLS.

It is felt that the above program will meet the spirit and the letter of the law as presently required by Federal courts. It complies with the good faith requirements of the court order. This plan provides for the maintenance of the high academic standard desired by the entire school district. This plan does not force integration upon anyone and provides for integration for those who want it. Moreover, it is designed to

function without seriously affecting the ever present problem of over-crowded schools of the Houston Independent School District. Depending upon the studies made of this plan by the Board at the end of each school year, proper recommendations will be made in order to main-

tain this plan in compliance with existing laws.

BE IT FURTHER RESOLVED that the attorneys for the School District file this plan with the Federal District Court and that they present it to the Court as the plan best suited for the Houston Independent School District.

## Action in U.S. District Court August 3, 12

### ORDER

The defendant Board of Trustees of the Houston Independent School District having been ordered on October 15, 1957, with all deliberate speed to abandon its operation of its public school system on a racially segregated basis, and to devise and adopt a plan looking to the maintenance and operation of its schools upon a racially nonsegregated basis;

And said defendant having been ordered on April 8, 1960, to file with this Court, on or before June 1, 1960, such plan as the defendant had adopted to this end, for the Court's consideration and approval; and the defendant having filed such plan herein June 1, 1960, and having submitted same to the Court for consideration and approval;

This Court here and now finds that said plan does not constitute compliance with the aforementioned order of this Court, nor does it constitute a good faith attempt at compliance; but is a palpable sham and subterfuge designed only to accomplish further evasion and delay.

It is therefore ORDERED that at the opening of the regular school term in September, 1960, the public schools of the Houston Independent School District will be desegregated, as follows:

1. Each student entering the first grade may, at his option, attend the formerly all-white, or the formerly all-negro school within the geographical boundaries of which such student may reside;

2. Effective at the beginning of the regular school term in September, 1961, the plan set out in paragraph 1 above shall be applied to all students entering the first and second grades; and progressively, with the inclusion of the next higher grade each year, from year to year thereafter, until complete desegregation is accomplished in 1972.

3. Nothing herein shall be construed to prevent the transfer of a student at his request, or pursuant to reasonable transfer

rules promulgated by the school authorities, provided only that, in the latter case, the color or race of the student concerned shall not be a consideration.

Done at Houston, Texas, this 3rd day of August, 1960.

### ORDER

Following the entry of the Order in this cause on the 3rd day of August, 1960, counsel having suggested to the Court that two of the parties to this proceeding, namely, Dr. J. K. Glen and Mrs. A. S. Vandervoort were no longer members of the Board of Trustees of the Houston Public School District, and one of the parties to this proceeding, namely, Dr. William E. Moreland, was no longer Superintendent of the Houston Public School District, and that such parties had been succeeded in office by Mrs. Charles E. White and Mrs. H. W. Cullen, who presently are duly elected, qualified and acting members of the defendant Board of Trustees, and Dr. John W. McFarland, who is the duly qualified and acting Superintendent of the Houston Public School District, and who, in their official capacity, properly should be made parties hereto; and by amended pleadings filed with leave of the Court such substitution having been accomplished, and the defendants, Mrs. Charles E. White, Mrs. H. W. Cullen, and Dr. John W. McFarland, having appeared and answered herein;

And counsel for the defendants having suggested to the Court that such counsel found portions of the Order ambiguous, and having requested that the Court clarify same;

It is here and now ORDERED, that the Board of Trustees of the Houston Independent School District, and the members thereof, namely, Dr. Henry A. Petersen, President; Dr. W. W. Kemmerer; Mrs. Frank Dyer; Mrs. Earl Maughmer, Jr.; Mr. Stone Wells; Mrs. Charles E. White; and Mrs. H. W. Cullen; and the Superintendent of the Houston Public Schools,



the defendant Dr. John W. McFarland, and other officers and employees thereof, will desegregate the public schools of the Houston Independent School District pursuant to the following plan and schedule;

1. At the opening of the regular school term in September, 1960, each student entering the first grade (by which is meant the first of the six regular grades of elementary school, and as distinguished from the kindergarten) may, at his option, attend the formerly all-white, or the formerly all-negro school within the geographical boundaries of which such student may reside;

2. At the opening of the regular school term in September, 1961, the plan set out in paragraph 1. above shall be applied to all students entering the first and second grades;

3. At the opening of the regular school term in September, 1962, the plan set out in paragraph 1. above shall be applied to all students entering the first to third grades, inclusive;

4. At the opening of the regular school term in September, 1963, the plan set out in paragraph 1. above shall be applied to all students entering the first to fourth grades, inclusive;

5. At the opening of the regular school term in September, 1964, the plan set out in paragraph 1. above shall be applied to all students entering the first to fifth grades, inclusive;

6. At the opening of the regular school term in September, 1965, the plan set out in paragraph 1. above shall be applied to all students entering the first to sixth grades, inclusive;

7. At the opening of the regular school term in September, 1966, the plan set out in

paragraph 1. above shall be applied to all students entering the first to seventh grades, inclusive;

8. At the opening of the regular school term in September, 1967, the plan set out in paragraph 1. above shall be applied to all students entering the first to eighth grades, inclusive;

9. At the opening of the regular school term in September, 1968, the plan set out in paragraph 1. above shall be applied to all students entering the first to ninth grades, inclusive;

10. At the opening of the regular school term in September, 1969, the plan set out in paragraph 1. above shall be applied to all students entering the first to tenth grades, inclusive;

11. At the opening of the regular school term in September, 1970, the plan set out in paragraph 1. above shall be applied to all students entering the first to eleventh grades, inclusive;

12. At the opening of the regular school term in September, 1971, the plan set out in paragraph 1. above shall be applied to all students entering the first to twelfth grades, inclusive;

13. At the opening of the regular school term in September, 1972, any grade or class not heretofore specifically referred to (if there be such), will be desegregated in similar fashion.

14. Nothing herein shall be construed to prevent the transfer of a student at his request, or pursuant to reasonable transfer rules promulgated by the school authorities, provided only that, in the latter case, the color or race of the student concerned shall not be a consideration.

Done at Houston, Texas, this 12th day of August, 1960.

## Action in Court of Appeals September 6

### BY THE COURT:

ON CONSIDERATION of the Application for Stay of the Order of the United States District Court of August 12, 1960,

IT IS ORDERED that said Application for Stay be, and the same is hereby, Denied.  
August 26, 1960

• • •

The original complaint praying for a desegregation of the public schools operated by the Houston Independent School District was filed on December 26, 1956. On October 15, 1957 the district court entered a judgment restraining and enjoining the defendants, Houston Independent School District, its officers and members and the Superintendent of public schools of said

district and their successors in office from requiring segregation of the races in any school under their supervision from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 349 U.S. 294. That judgment was accompanied by a full opinion incorporating the findings of fact and conclusions of law of the district court.

[Progress Report, Plan Ordered]

On June 30, 1959, on the plaintiff's motion for further relief, the district court entered an order requiring the defendant Houston Independent School District on or before August 17, 1959 to file under oath with the Clerk of the Court statements showing the steps taken looking to a compliance with the decree of October 15, 1957 and to file at that time the plan or program, if any, it has adopted looking to a full compliance with such order. On May 13, 1960 the court denied the defendant's motion for extension of time. On June 1, 1960 the Houston Independent School District filed what is called its plan of desegregation providing for the admission to its

schools of all the scholastics within said district on a racially non-discriminatory basis, the said plan being to commence in September 1961 a voluntary integration permitting one elementary school, one junior high school, and one senior high school to become integrated. On August 3, 1960 the district court found that said plan does not constitute a good faith attempt at compliance with the previous orders of the court but is a palpable sham and subterfuge designed only to accomplish further evasion and delay, and thereupon entered an order that at the opening of the regular school term in September 1960 the public schools of the Houston Independent School District will be desegregated as described in said order. On August 12, 1960 the district court entered an order clarifying its order of August 3, 1960 with respect to desegregation of the schools. This appeal is prosecuted from the last mentioned order entered on August 12, 1960.

We find ourselves in agreement with the reasoning of the court as expressed in its opinion of October 15, 1957 and its subsequent orders, and we find no reversible error in the record. The judgment appealed from is therefore

AFFIRMED.

September 6, 1960

## Opinion by State Attorney General

Dr. J. W. Edgar  
Commissioner of Education  
Austin, Texas  
Opinion No. WW-931

Re: Application of Article 2900a to the Houston Independent School District under the stated facts.

Dear Dr. Edgar:

You have asked for the opinion of this office on the following recitation:

"On or about the 28th day of December, 1956, several plaintiffs filed an original complaint in the United States District Court for the Southern District of Texas against the Houston Independent School District on the authority of *Brown v. Board of Education*, to speed the process of desegregation of the Houston Independent School District. The Defendant District duly answered the complaint and the case was called to trial

on May 20, 1957, after which the Court entered its order on the 15th day of October, 1957, that the Houston Independent School District commence desegregation on a non-discriminatory basis from and after such time as necessary arrangements could be made.

"Article 2900a, Texas Civil Statutes, was passed by the Texas Legislature. This Statute became effective August 23, 1957, after which the Houston Independent School District has made efforts to comply therewith. In order to comply with Article 2900a, the Houston Independent School District caused petitions to be executed by some 87,000 qualified electors residing in the district, which was far in excess of the 20% required by the Statute. Thereafter an election was held in which the majority of the qualified electors voted not to abolish the dual public school system. In short, the Houston Independent School Districts has

done everything possible to comply with both State and Federal law.

"Thereafter, on the 12th day of August, 1960, the Federal District Court issued its order requiring desegregation in the Houston Independent School District commencing in the first grade. A copy of said order is attached.

"Obviously, the Houston Independent School District is confronted with the dilemma of losing its accreditation and its Foundation Program Funds and complying with the mandate of the Federal District Court. It should be observed that the dual public school system as such has not been abolished in that there will remain segregated systems except for the first grade in this present scholastic year. Moreover, the Board of Trustees has not abolished the dual public school system nor has the Board of Trustees abolished allowance for transfer out of the district. In short, the Federal District Court rather than the Board of Trustees has brought about the noncompliance of the Houston Independent School District with Article 2900a."

You state that: "The dual public school system as such has not been abolished . . ." It is unnecessary to pass upon that question in the present opinion.

The answer to your question hinges upon the construction to be accorded Section 1 of Article 2900a, which provides as follows:

"That no board of trustees nor any other school authority shall have the right to abolish the dual public school system . . . unless by a prior vote of the qualified electors residing in such district the dual school system is abolished."

Prior to the enactment of Article 2900a, the Supreme Court of the United States had held that racial discrimination in public education was violative of the Constitution of the United States. *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294. However, as the Supreme Court of Texas pointed out in *McKinney v. Blankenship*, 282 S.W.2d 691, the Court in the *Brown* case did not direct immediate and complete integration in all schools. The Court recognized, and has since recognized, by a long line of decisions, that time would be required, the length of which would be largely dependent

upon local conditions, for the full accomplishment of its decree.

We believe that a careful reading of Article 2900a evidences recognition by the Legislature of Texas that hasty and precipitate action by the school districts of the State in making the transition from racially segregated to integrated schools could conceivably impede the effectiveness of our schools. The language of the Act furnishes ample justification for the conclusion that it was designed to legally achieve the maximum time for making the transition.

It is significant that Section 1, above quoted, provides that "no school board or other school authority" shall have the right to abolish the dual system of public schools. The pains and penalties of the Act are evidently applicable only if the dual system is abolished by either: (1) the school board, or (2) other school authority. The Act provides no penalty where the dual system is abolished by judicial decree. This leads us to the question: By what authority has the dual system of public schools been abolished in the Houston Independent School District? The school board has entered no order calling for abolition of the dual system. In fact, the board felt impelled, for reasons it deemed sufficient, to offer legal resistance to the entry of the order which was in fact entered and is now in the process of perfecting an appeal from that order. In this connection, it is significant that Article 2900a provides no penalty where the dual system of public schools is abolished by judicial decree. Such is the case here, and hence we must conclude that the dual system of public schools for the Houston Independent School District has not been abolished by the "board of trustees or other school authority," as prescribed by Article 2900a.

This Article provides in substance that any person who violates the Act will be guilty of a misdemeanor and shall be fined not less than \$100 nor more than \$1000. Should we construe the Act as prohibiting abolishment of the dual school system by judicial decree, such as we have here, it would be tantamount to placing the local school board in a legal dilemma, with their prosecution assured by either State or Federal authority, and from which there could be no extrication. If they sought to impede or obstruct the execution of the Federal Court decree the members of the school board would thereby render themselves subject to contempt by the Federal courts. On the other hand, if they did

not prevent execution of the decree they would subject themselves to a possible fine of not to exceed \$1000 under the State law. It has been said that a court will never adopt a construction that . . . will lead to absurd conclusions or consequences if the language of the enactment is susceptible of any other meaning. 39 Tex. Jur., Statutes, Section 118, *Staples v. State*, 112 Tex. 61, 245 S.W. 639; *Fenet v. McCuiston*, 105 Tex. 299, 147 S.W. 867; *Shipley v. Floydada Independent School District* (Comm. App.), 250 S.W. 159.

We believe that the construction which we have accorded to the statute is not only in keeping with the actual language employed but is calculated to achieve the evident purpose of the enactment as well. This conclusion is in accordance with the argument advanced by the Houston School Board.

#### SUMMARY

Under the facts as stated, the Board of

Trustees of the Houston Independent School District, or other school authority, has not abolished the dual system of public schools within the meaning of Article 2900a, Vernon's Civil Statutes, and hence neither the school district nor its trustees are subject to the penalties of said Article.

Yours very truly,

WILL WILSON

Attorney General of Texas

By Leonard Passmore

First Assistant

LP:dhs

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman

Gordon Cass

Houghton Brownlee, Jr.

John Reeves

REVIEWED FOR THE ATTORNEY

GENERAL

BY: Henry Braswell

## Minutes of School Board Meeting

### MINUTES OF A SPECIAL MEETING OF THE BOARD OF EDUCATION OF THE HOUSTON INDEPENDENT SCHOOL DISTRICT

September 6, 1960

#### Meeting Held—Members Present—Absent

The Board of Education of the Houston Independent School District held a special meeting at 7:30 p.m. on September 6, 1960, in the Board Conference Room of the Administration Building of said District.

Members Present: Dr. Henry A. Petersen, President; Mr. Stone Wells, Vice President; Mrs. H. W. Cullen; Mrs. Frank Dyer; and Mrs. Charles E. White.

Members Absent: Dr. W. W. Kemmerer, Secretary; and Mrs. Earl Maughmer, Jr.

Others Present: Dr. John W. McFarland, Superintendent; Dr. H. S. Brannen, Deputy Superintendent and Business Manager; Mr. Glenn Fletcher, Deputy Superintendent; Mr. Joe Reynolds, Board Attorney; several administrative staff members; a number of visitors; and reporters.

#### Meeting Called To Order—Purpose

Dr. Petersen, President, called the meeting to

order and declared the Board convened in special session to take further action with reference to the order of Federal District Judge Ben C. Connally that the Houston schools be desegregated beginning with the first grade in the fall of 1960.

#### Matters Presented—Disposition

Dr. Petersen announced that the District's hearing today before the Court of Appeals in New Orleans for a delay in implementation of the Federal District Judge's order for desegregation had been ineffectual and that it was now the duty of this Board of Education to instruct the Superintendent of Schools as to what he should do.

The following matters were presented and disposed of as indicated.

1. SUPERINTENDENT INSTRUCTED TO RECEIVE APPLICATIONS OF FIRST-GRADE STUDENTS OF ONE RACE DESIRING TO ENTER A SCHOOL OF THE OPPOSITE RACE

Mr. Wells made a motion that the Superintendent of the Houston Public Schools be instructed to receive all applications of those first-grade students of one race desiring to enter a school of



the opposite race; that all applications be reviewed to determine whether or not they meet the requirements as established by this Board of Education, and that each such applicant be notified as to his placement not later than Friday, September 9, 1960. Mrs. Dyer seconded the motion.

Mrs. White said it seemed that this motion was in line with the previous actions of the Board in always taking a negative point of view. She added that it has not been necessary in the past to take two or more days to admit children into school after they have enrolled.

Mrs. White then offered a substitute motion that the Board of Education of the Houston Independent School District direct the Superintendent of Schools to comply forthwith in good faith with the directives of the Federal District Court, and to do so in a manner in keeping with our Nation's heritage as set forth in the Declaration of Independence, the Constitution of the United States, and our Christian-Judaic heritage

of the worth, under God, of each individual. There was no second to the substitute motion.

The Chairman called for the vote on the original motion made by Mr. Wells and it carried, Mrs. White abstaining, stating that she was not opposed to directing our Superintendent to comply with the Federal District Court's order but she was opposed to injecting areas of discrimination and subterfuge.

#### *Adjournment*

There was no further business to come before the Board and the Chairman declared the meeting adjourned.

#### *Minutes Approved*

The foregoing minutes of a special meeting of the Board of Education of Houston Independent School District held on September 6, 1960, were duly approved at a meeting held on \_\_\_\_\_, 1960.

## EDUCATION

### Public Schools—Virginia (Floyd County)

**James D. WALKER, an infant, et al. v. FLOYD COUNTY SCHOOL BOARD, et al.**

United States District Court, Western District, Virginia, Roanoke Division, September 8, 1960, Civil Action No. 1012.

**SUMMARY:** In September, 1959, Negro children of Floyd County, Virginia, challenged the action of the county school board in sending them into another county for their schooling, while maintaining schools for white students. A United States district court directed their admission to white high schools in Floyd County in January, 1960. At the next term eight other Negroes asked for and received similar relief, under reasoning similar to that in *Goins v. School Board of Grayson County, infra*, P. 716.

#### Memorandum

PAUL, J.

This matter comes before the court upon the intervention as plaintiffs of certain Negro children, residents of Floyd County, who seek the right to enter the high schools of Floyd County as pupils therein.

This case, prior to his death, was heard by the late Roby C. Thompson.

The facts in this case are similar to those in

several other cases which have been before the court. Floyd County does not maintain a high school for Negro children and until this action was brought all Negro children of high school age resident in Floyd County were sent to a school known as Christiansburg Industrial Institute, in Montgomery County. When the action was originally brought some 13 or 14 Negro children, as plaintiffs, sought in this court an injunction restraining the defendants, School Board of Floyd County and J. H. Combs,

Superintendent of Schools, from denying the plaintiffs admission to the high schools located in and maintained by Floyd County and entrance to which had previously been denied them on account of their race.

After a hearing Judge Thompson entered an order on September 23, 1959, the effect of which was to order the admission to the high schools maintained by Floyd County of the plaintiffs in the original suit, with one exception. Pursuant to that order nine Negro students of high school age were admitted to Floyd High School and four Negro children of like age were admitted to Check High School, both of which high schools are located in Floyd County and had previously been attended exclusively by white children.

The matter now before the court is upon the application of eight other Negro children of high school age who have been permitted to intervene and who seek admission to the high schools maintained by Floyd County. Judge Thompson has heretofore established and decreed the basic right of Negro children of high school age in Floyd County to be admitted to the public high schools of that county without discrimination as to race and there can be no doubt of the right of the present intervenors, with one exception, to be admitted to the high schools of Floyd County. The exception is Helen Louise Price, one of the intervenors, who it appears is not a resident of Floyd County.

Therefore, an order will be entered enjoining the defendants from denying to these intervening plaintiffs the right to be enrolled in and receive instruction in public high schools within Floyd County. This order will make the right accorded to these intervenors effective immediately, in order that they may be assigned to

high schools within Floyd County for the session of school just beginning.

### Order

This matter having come on to be heard upon the pleadings filed, the petition of certain persons intervening as plaintiffs, evidence taken before the court on August 23, 1960, and upon the arguments of counsel.

And the court having now duly considered the same.

Therefore, for reasons which have this day been stated in a written memorandum of the court of this date, filed with the record as a part thereof, and to which reference is hereby specifically made;

it is ADJUDGED, ORDERED and DECREED that the defendants, County School Board of Floyd County and J. H. Combs, Superintendent of Schools of Floyd County, Virginia, and their respective successors in office, together with their officers, agents and employees, and all other persons in active concert or participation with them, be, and they are hereby, forthwith and permanently enjoined and restrained from denying to James S. McDaniel, Jr., Paul Larry Taylor, Constance Rebecca Akers, Jeanette Florence Price, James Robert Price, Iver C. Stuart and Clarice Lemons the right and privilege of being enrolled in, attending and receiving instruction in high schools located within Floyd County, Virginia, operated and administered by said defendants.

It is further ORDERED that the right of the persons thus named to enter high schools maintained in Floyd County be effective immediately and that they be enrolled in said schools for the present session now commencing.

## EDUCATION

### Public Schools—Virginia (Grayson County, Galax)

**Rita GOINS, an infant, et al., etc. v. The COUNTY SCHOOL BOARD OF GRAYSON COUNTY, the City of Galax, etc.**

United States District Court, Western District, Virginia, Abingdon Division, September 8, 1960, Civil, 186 F.Supp. 753.

United States Court of Appeals, Fourth Circuit, September 13, 1960, 202 F.2d 343.

**SUMMARY:** Eight Negro school children of Grayson County, Virginia, filed suit in United States district court alleging that defendant school officials are engaging in discriminatory action against them. On trial, it was shown that Grayson County had no high school for Negroes, but transported them more than 40 miles to attend a school in an adjoining county. White high school students from the same area were sent to the Galax high school, which is an independent district with its school located in Grayson County. The court found the facts to fit the situation in *Warren County v. Kilby*, 259 F.2d 497, 3 Race Rel. L. Rep. 972 (1958), and ordered the admission of the Negro children to Galax high school. The order specified that the Negroes "must be treated in all respects as if they were white children and accorded the same opportunities and rights to acquire a high school education." Only the eight named plaintiffs were included in the order, but the court indicated that others in the same situation would be entitled to similar relief. The city of Galax then notified all county students enrolled in the city school not to attend, and both defendant county and city sought a stay order from the Court of Appeals for the Fourth Circuit. When that court indicated it would advance the appeal but was not willing to grant a stay, the city agreed to accept the eight Negroes and reinstate the other white county pupils for the 1960-61 school year, but stated its position that the contract with the county was abrogated and announced its conditions for a new contract. Reproduced below are the opinions and orders of the district court and the court of appeals, and the resolutions adopted by the school board.

### Galax School Board Resolution of August 9, 1960

Upon motion duly made and unanimously carried the following resolution was adopted.

WHEREAS, an agreement heretofore existed between the school authorities of the Town of Galax (now the City of Galax) and of Grayson County under which certain students of Grayson County residing in the Oldtown District of Grayson County were admitted to Galax High School; and

WHEREAS, this agreement never intended to require either the town of Galax or the City of Galax to accept any student residing in said District of Grayson County who might apply, without any discretion on the part of the school authorities of Galax; and

"NOW, THEREFORE, BE IT RESOLVED that should the agreement be interpreted, or an attempt be made to do so by or on behalf of anyone that the City of Galax is required to accept at Galax High School all children of Oldtown District of Grayson County, regardless of their qualifications, or whether they are within the original intendment of the agreement, it is the considered opinion of the City School Board of the City of Galax that this justifies action to rescind the arrangement because of mutual mistake of the parties as to its meaning and import; and the same is now ORDERED be done. The Division Superintendent of Schools of the City of Galax shall thereupon notify the school authorities of Grayson County of this action.

### Galax School Board Resolution of September 7

Upon motion duly made and unanimously carried, the following resolution was adopted;

Whereas the presiding Judge in the case pending under the short style case of Rita Goins and

Juanita Goins, Infants by etc., et als v. The City of Galax, A Municipal Corporation, etc., et als, in the United States District Court for the Western District of Virginia, Abingdon Division, in informal conference held in his office in Charlottesville, Virginia on the 6th day of August, 1960, indicated his intention of entering an order in said case restraining and enjoining the City School Board of the City of Galax from refusing to admit to the Galax High School the named plaintiffs in said suit and all others similarly situated so long as the said School Board accepts white students residing in the Oldtown Magisterial District of Grayson County, Virginia, and;

Whereas, this board adopted a resolution on the 9th day of August, 1960, declaring its intention to rescind the arrangement theretofore existing between this board and the School Board of Grayson County, Virginia should the arrangement or agreement be interpreted or an attempt be made to do so by or on behalf of anyone that the City of Galax is required to accept at Galax High School all children of Oldtown District of

Grayson County, regardless of their qualifications or whether they are within the original intentment of the agreement, and;

Whereas, the named plaintiffs in said suit and others similarly situated are not within the intentment of said arrangement or agreement, and;

Now, Therefore, Be It Resolved, that said agreement be hereby declared rescinded by the City School Board of the City of Galax, Virginia, and that on and after the effective date of said decree, no high school student residing in the Oldtown District of Grayson County, Virginia will be accepted in the Galax High School by the City School Board of the City of Galax. The Division Superintendent of the Schools of the City of Galax is directed to forthwith transmit a copy of the said resolution to the Division Superintendent of Schools of Grayson County, Virginia, and a copy of each resolution to the Chairman of the County School Board of Grayson County, Virginia.

## District Court Opinion of September 8

PAUL, J.

The plaintiffs in this action are Negro children of high school age, eight in number, who reside in Grayson County, Virginia.

It appears that Grayson County has never maintained a high school for the education of Negro children and that children of that race who are of high school age and who desire to attend high school are sent to what is spoken of as Scott High School in the adjoining county of Wythe, this being a high school maintained for Negro children. Each school day they are transported from their homes in Grayson County to the school in Wytheville and returned. The distances which they have to travel vary with the location of their respective residences, which are probably from thirty to forty miles from Wytheville. In this respect the case is factually similar to that existing in the case of *The School Board of Warren County vs. Kilby*, 259 Fed. 2d 497.

These plaintiffs seek an order of this court establishing their right to receive a high school education on the same basis and under the same conditions under which white children in Grayson County are attending high schools. The con-

ditions under which white children of high school age are educated in Grayson County are somewhat unusual. The city of Galax is located on the county line between Carroll County and Grayson County and that city maintains a high school within its limits but which is located on the Grayson side of the county line. Galax is a separate and independent school district, having its own school board and superintendent of schools. Grayson County maintains a high school in the town of Independence, within that county. In the year 1952 the Grayson County School Board entered into a contract with Galax (then a town) under the provisions of which children living outside of the town of Galax, in Oldtown Magisterial District of Grayson County, were admitted as students to the Galax High School. The county of Grayson made payment to the town of Galax on the basis of a per capita cost of operating the high school. Presumably this contract was entered into because Oldtown District is adjacent to Galax and the school there was much closer to the residences of children living in that vicinity than was the town of Independence, where the only other high school in the county was located.



*[Galax Now a City]*

Since 1952 the municipal corporation of Galax has become a city, but the parties have continued to operate under the contract entered into in 1952. At present it appears that there are 250 or more white children living in Oldtown Magisterial District attending the Galax High School. This contract, a copy of which is filed as an exhibit in the case, makes no mention of the race or color of the children who may be admitted to the Galax High School, but merely provides in general terms that Galax will admit to the Galax High School students of high school age who may be residents of Oldtown Magisterial District of Grayson County. Presumably all other white children living in other parts of Grayson County are assigned to the high school at Independence.

All of the plaintiffs in this case are residents of Oldtown Magisterial District and, therefore, possess the same residential qualifications as the white children who are admitted to the Galax High School. And in this action they seek to have declared their right to enter the Galax High School, along with white children of high school age residing in Oldtown Magisterial District.

There can be no question that the practice of sending these plaintiffs outside of their own county to attend school and denying them solely on account of their race the right to be educated within a high school in their own county under the same conditions as white children is something which cannot be legally defended. This practice was condemned in *Corbin vs. School Board of Pulaski County*, 177 Fed. 2d. 924, and was specifically outlawed in *School Board of Warren County vs. Kilby*, *supra*.

A number of matters of defense have been raised by the defendants in this case, most of which relate to alleged failure of the plaintiffs to make proper formal application for entrance to the white schools and other similar technical objections. These need not be discussed. At most they could have no outcome except to delay the enforcement of the rights of the plaintiffs, which are so plain that no defense can be made to them on the merits. It seems also highly desirable that here at the beginning of the school year the rights of the plaintiffs should be definitely and finally adjudicated.

*[Willing To Assign]*

In the course of the argument of the case by counsel and conferences had with them it ap-

pears that the School Board of Grayson County, recognizing the rights of these plaintiffs, is willing to assign them to and accept them as students in the high school at Independence, which has heretofore been attended only by white children, but that the Board feels that it cannot assign these children to attend the Galax High School without the expressed willingness of the School Board of Galax to accept them as students at that school. On the other hand, the plaintiffs, being residents of Oldtown Magisterial District, insist on their right to attend the same school as the white children in Oldtown Magisterial District who are being educated in the Galax High School under the contract heretofore referred to between Grayson County and Galax. It is urged by the defendant, Grayson County School Board, that if it attempts to have these Negro plaintiffs educated in the Galax High School the city of Galax may abrogate the existing contract, with the result that all of the children, both white and Negro, living in Oldtown Magisterial District would of necessity have to attend the high school at Independence, the physical capacity of which is such that it would be most difficult to accommodate these additional pupils. Such a result would be unfortunate, but I do not think that this should be permitted to override the constitutional rights of these plaintiffs.

*[No Ruling on Contract]*

This court does not undertake to pass upon the right of the city of Galax to terminate its contract with the county of Grayson—a right which it may or may not have. But the court is convinced that under the terms of its contract it cannot say that it will continue to accept white students from Grayson County into the Galax High School, but will refuse to accept Negro students. It must accept students of both races or neither.

The result is that the order to be entered will provide that these plaintiffs must be treated in all respects as if they were white children and accorded the same opportunities and rights to acquire a high school education as is accorded to white children of high school age residing in Oldtown Magisterial District of Grayson County, wherever that may be.

This purports to be a class action brought not only on behalf of the named plaintiffs, but on behalf of all other Negro children of high school age residing within Grayson County. The court

does not know how many other Negro children may be eligible for entrance into the high schools of the county, but it is believed that at this time the eight named plaintiffs should be the only ones affected by the order of the court. The reason for thus limiting the present application of the order is that it is always desirable and frequently necessary that the authorities charged with the maintenance of the schools should have some knowledge prior to the opening of the school year as to how many students may be expected to attend school, in order that they may be able to outline the proper school program and to make the preparations of various sorts for accommodating the number of children that may be fairly expected to attend. The school authorities of Grayson County and of Galax have been aware of the desire of the eight named applicants, as set out in this action, but they should not be faced at this late hour of having to make arrangements to educate a possibly large number of additional Negro children. Of course, any Negro children of high school age in Grayson County will have for the future the same rights now adjudicated in regard to the eight named plaintiffs. If in any future school years other Negro children of high school age should desire to assert their rights, they should make application to the School Board at a reasonable time before the beginning of the school year.

#### ORDER

This matter having come on to be heard upon the pleadings filed, the evidence taken before the court on August 23, 1960, and upon the arguments of counsel, and the court having now duly considered the same.

Therefore, for reasons which have this day been stated in a written memorandum of the court of this date, filed with the record as a part thereof, and to which reference is hereby specifically made;

It is ADJUDGED, ORDERED and DE-

CREED that the defendants, County School Board of Grayson County and Alonzo Monday, Jr., Division Superintendent of Schools of Grayson County, Virginia, and their respective successors in office, together with their officers, agents and employees, and all other persons in active concert or participation with them, be, and they are hereby, forthwith and permanently enjoined and restrained from refusing to admit for reasons of race or color any high school student or students eligible to enter any high school who resides in Grayson County to any of the public high schools in said county heretofore maintained and operated for white students or to the Galax High School, located in the city of Galax, so long as the School Board of Grayson County shall continue to provide education in the Galax High School for any high school students resident in Grayson County.

It is further specifically ORDERED that so long as the city of Galax or the School Board of said city shall permit students resident in Grayson County to attend the Galax High School and be educated therein it shall also accept and educate in the Galax High School any Negro students of high school age resident in Grayson County and that in all respects white children and Negro children resident in Grayson County and eligible to high school education shall be treated alike and without discrimination as to race or color.

Counsel for the defendant, School Board of Grayson County, having moved the court that any order entered herein not be made effective until the beginning of the school year in September, 1961, in order that the county of Grayson may make provision for better accommodations of any high school students who, as the result of the action of the court, are compelled to be educated in the high schools of said county.

And the court being of opinion that said motion offers no sufficient reason for withholding the entry of an order in this case.

It is accordingly ORDERED that said motion be, and the same is hereby, denied.

### Action in U. S. Court of Appeals

Grayson County has heretofore maintained no high school for the education of Negro pupils. Children of that race have been sent by bus to the Scott Memorial High School in the adjoining County of Wythe. White children of high school

age, however, have been educated in high schools maintained by the County or, (if they resided in what is known as the Oldtown District, adjacent to the City of Galax, an independent political unit of the state,) they were admitted

to the Galax High School under a contract between the two political units that have been in existence since 1952. The Galax High School has a population of 311 residents of that City and 285 residents of the Oldtown District of Grayson County.

The eight Negro plaintiffs are of high school age and residents of the Oldtown District who object to being compelled to travel for their education to the adjoining County, a distance of approximately 48 miles from their homes. Testimony was offered showing the hardships involved.

District Judge John Paul, after a hearing, found that this case was factually similar to the case of *The School Board of Warren County v. Kilby*, 259 F.2d 497 (4th Cir., 1958). In that case this court held that the practice of requiring Negro pupils to travel long distances from their homes to an adjoining county, while white pupils were permitted to attend schools near their homes, constituted a legally indefensible discrimination. Judge Paul ordered that Negro children of high school age in Grayson County should be accorded the same rights as white children, and that, if Grayson County sent white children of the Oldtown District to the high school of Galax County, then the Negro children of that district must likewise be admitted. The school authorities of the City of Galax then announced their intention to abrogate the contract between Grayson County and the City of Galax, taking the position that rather than admit the eight Negroes they would deny admission to all students from the Oldtown District. This resulted in the automatic exclusion from the Galax High School of 285 white children residing in the Oldtown District and therefore attending the Galax High School. Judge Paul's order was signed last Thursday, September 8th, and the next day the 285 were notified by the Galax School Authorities not to come to school today, Monday, September 12th, 1960. This action was pursuant to a Board resolution made on August 9th.

Counsel for the plaintiffs and for the School

Boards of Grayson County and the City of Galax appeared before me today and stated their respective positions. Upon being advised of my disinclination to stay Judge Paul's order, and my willingness, nevertheless, to advance the appeal to an early hearing, counsel consulted among themselves. In the course of their discussions they communicated by telephone with their respective clients and certain arrangements were then announced which dispelled the present crisis. These were:

1. The eight Negro plaintiffs will be accepted in accordance with the District Court's order, and the appeal will be dismissed. A copy of this order will be the Clerk's authority to dismiss under Rule 23 of this court.
2. The 285 excluded white children will be readmitted to Galax High School for this year.
3. The Galax School Board adheres to its position that the contract between the two Boards is abrogated and that future arrangements, if any, will be made under the Virginia statute (Section 22-219 of the Virginia Code, 1950), under which the school authorities of one jurisdiction may arrange for the education of their pupils in other jurisdictions.
4. The School Board of Grayson County acquiesces in the rescission of the contract and will promptly, not later than November, 1960, enter into negotiations with the Galax School Board with a view to arrangements for future school years.

Under these circumstances the Application for a Stay is denied. It remains only to add that the two school boards, in the hearing before me and in the following negotiations between counsel, have evidenced a commendable regard for the public welfare, avoiding disruption of the education of the great number of white pupils, as well as a readiness to comply with the court's order in respect to the eight plaintiffs.

**EDUCATION****Public Schools—Virginia (Pulaski County)****Alice E. CRISP and Nellie D. Crisp, etc. v. PULASKI COUNTY SCHOOL BOARD et al.**

United States District Court, Western District, Virginia, Roanoke Division, April 26, 1960, Civil Action No. 1052.

**SUMMARY:** Fourteen Negro children of Pulaski County, Virginia, challenged the constitutionality of a system whereby they were sent to a high school in an adjoining county for their education, although Pulaski County maintained high schools for white students within the county. The court ruled that this practice violates the due process and equal protection clauses of the Fourteenth Amendment, and ordered the admission of the named plaintiffs to schools within the geographic limits of the county on the same basis as white students. The court also directed that the county admit any similarly qualified Negro who applies on or before March 15 of any year for enrollment at the term starting the following fall.

**ORDER****THOMPSON, J.**

On April 1st, 1960, this case was heard upon plaintiffs' motion for an interlocutory injunction, the defendants' motion to dismiss, the admission of the defendants in open court, and the argument of counsel, at which time the motion to dismiss was denied and the Court was of the opinion that the plaintiffs had a clear and present right to be admitted to and attend the high schools located within the county of Pulaski, but since more than two months of the final semester had expired that it would disrupt the orderly educational processes and that the rights of the plaintiffs would not be prejudiced by postponing action on the motion for a restraining order until the case had matured and had been heard on its merits.

The case having matured came on to be heard and tried on April 21, 1960 upon the complaint filed in this case and the prayer thereof for an injunction to restrain and enjoin the defendants from denying infant plaintiffs, on account of race or color, the right to attend high school within the county of Pulaski, Virginia; and also came the defendant School Board and the defendant Division Superintendent of Schools by their attorneys, and the Pupil Placement Board of the Commonwealth of Virginia by its attorney; and upon the answers to the complaint filed by the defendants, and after hearing evidence introduced into the record, and upon certain admitted facts as appears from the record, the Court makes the following Findings of Fact:

**(1)**

That the following plaintiffs, to wit: Nellie D. Crisp, Vernice Crouse, Sandra Patterson, Raymond Gaither, Jr., Clyde E. Grubb, Mary Ann Hogan, Robert Lewis, Rosemma Payne, David C. Payton, Patricia Sue Poindexter, David James Poindexter, Richard A. Smith, James E. Webb, and David Webb are residents of Pulaski County, Virginia, and are within the age limits of eligibility to attend the public schools, and are otherwise eligible for admission to the public high schools in Pulaski County.

**(2)**

Defendants County School Board of Pulaski, a body corporate of the Commonwealth of Virginia, and the Division Superintendent of Schools of the county of Pulaski are responsible for the establishment, maintenance, operation, and supervision of schools of said county. These defendants have established and now maintain, operate and supervise three public high schools, two of which are located in Pulaski County in Pulaski and Dublin respectively, and one at Cambria in Montgomery County, Virginia, which latter high school is jointly owned and operated by Pulaski County, Montgomery County, and the City of Radford. Pulaski High School and Dublin High School have theretofore been operated exclusively for white students and the high school known as Christiansburg Institute at Cambria, Virginia, has been operated exclusively for Negro students. The defendants do not maintain or operate a high school for eligible Negro students within the geographical limits of Pulaski County.



## (3)

The 14 named plaintiffs above heretofore made application for admission to Pulaski High School located in Pulaski County, which applications were forwarded to the state Pupil Placement Board in Richmond. The plaintiffs were denied admission to Pulaski High School. Thereupon, the named plaintiffs appealed to said Pupil Placement Board, and at a hearing duly held by said Board at Pulaski, Virginia on February 4, 1960, the applications of the plaintiffs for admission to Pulaski High School for the school session 1959-60 were denied.

## (4)

The plaintiffs and others similarly situated, by reason of their race, are not permitted to attend public high schools in Pulaski County; but they are required to be transported to Cambria in Montgomery County, Virginia, a round trip distance of approximately 52 miles, to attend Christiansburg Institute.

## (5)

At a hearing before the Court, it was agreed by all parties that the applications of the plaintiffs heretofore filed would be treated as continuing applications for admission to the 1960-61 school term, provided the plaintiffs indicated in writing their desire for such admission, and the said 14 named plaintiffs filed their requests in writing the 21st day of April, 1960 with the Court.

## (6)

Christiansburg Institute is owned and operated by Pulaski County jointly with Montgomery County and the City of Radford; therefore, advance knowledge of the number of students who expect to attend said Institute should be available to the school authorities so that they may plan and make the necessary arrangements for the operation of each school session. The plans for all three high schools for the session 1960-61 have already been made and the budget has been formulated and approved. The teachers have been selected and notified for the 1960-61 school year. The plans and financial arrangements for the operation of all schools for each school year are made from January through April of each year.

## (7)

In the operation of Christiansburg Institute, Pulaski County contributes annually from 42 to

49 per cent of the total contributions made by the three political subdivisions which own the school.

## (8)

It is not known how many of the approximately 116 students now attending Christiansburg Institute, other than the 14 named plaintiffs, desire to be admitted to the public schools in Pulaski County, and it is not known how many Negro students who are residents of Pulaski County would desire to attend the schools in Pulaski County or to attend Christiansburg Institute.

## CONCLUSIONS OF LAW

From the foregoing facts, the Court states the following Conclusions of Law:

## (1)

The Court has jurisdiction under 28 U.S.C.A. Sections 1331, 1343, as authorized by 42 U.S.C.A. Sections 1981, 1983.

## (2)

Plaintiffs' action in bringing this matter as a class or representative suit is both authorized and appropriate under the provisions of Rule 23(a) of the Federal Rules of Civil Procedure.

## (3)

The policy, custom or practice, pursuant to which defendant school authorities refuse to admit or enroll minor plaintiffs and all other Negro children similarly situated, by reason of their race, to the public high schools heretofore maintained exclusively for white students in Pulaski County and their action requiring minor plaintiffs and others similarly situated to attend the all-Negro Christiansburg Institute in Montgomery county, is violative of the due process and equal protection clauses of the Fourteenth Amendment to the federal constitution.

The minor plaintiffs and all other Negro children similarly situated have a clear right to be admitted and to attend the high schools in Pulaski County upon making application in the manner and within the time herein set out.

It is therefore ADJUDGED, ORDERED and DECREED AS FOLLOWS:

That the defendants and their respective successors in office, together with their officers,

agents and employees, and all other persons in active concert or participation with said defendants or their successors in office, or any of them who receive or have notice or knowledge of this order, are hereby permanently enjoined, beginning at the opening of the 1960-61 school year in September next, from denying or refusing to admit the 14 above named plaintiffs by reason of their race or color to the Pulaski High School.

It is further ORDERED that the defendants shall notify the fourteen minor plaintiffs or their parents in writing within 30 days from this date that they have been assigned to Pulaski High School, and will be admitted thereto beginning in September 1960.

It is further ORDERED that the defendants and their successors in office be, and they hereby are permanently enjoined from denying or refusing to admit to the high schools in Pulaski County any other Negro student situated similarly to the minor plaintiffs herein who makes application for admission in the manner and within the time herein set out.

It is further ORDERED that any Negro student who resides in Pulaski County who may apply to attend public high schools in Pulaski

County, Virginia on or before March 15, 1961 or on or before March 15 of any year thereafter shall be admitted to the school, without regard to race or color, within the geographical confines of Pulaski County to which he or she would normally be admitted if white, and the school officials are hereby required and directed on or before April 15th of the calendar year during which admission is desired to notify each applicant or the parent of the name of the school in Pulaski County to which the applicant has been assigned and will attend at the beginning of the school term.

It appearing that there is nothing further remaining to be done in this case, it is

#### ORDERED

that the same be stricken from the docket, with leave for the named plaintiffs and others similarly situated, on motion and for good cause shown, to have the same reinstated upon the docket for such further action as may be judicious.

The deputy clerk of this court at Roanoke will transmit a certified copy of this order to counsel of record.

## EDUCATION

### Colleges and Universities, Sit-ins—Alabama

**St. John DIXON et al. v. ALABAMA STATE BOARD OF EDUCATION**, Governor John Patterson, Ex-Officio Chairman; Robert R. Locklin et al., as Members of the Board, and H. Councill Trenholm, President of Alabama State College, etc.

United States District Court, Middle District, Alabama, Northern Division, August 26, 1960, 185 F.Supp. 945.

**SUMMARY:** Invoking general federal question and Civil Rights Act jurisdiction, six former students of the Alabama State College for Negroes brought an action in federal court to have enjoined the state board of education, its members, and the college president from interfering with their right to attend the college. Plaintiffs alleged that, without notice or opportunity to defend against charges, they had been expelled from the college by the board, without regard to any valid rule about student conduct, for the purpose of punishing and intimidating them for having participated in a sit-in demonstration at a publicly-owned lunchroom in the county courthouse in Montgomery, and that such action was arbitrary and in violation of their constitutional rights. The court found as fact that after 29 students of the college (including plaintiffs) had engaged in a sit-in until ordered out by police, the state governor, as chairman of the board, advised the president to investigate the incident

and suggested consideration of expulsion; that, in spite of warnings by the president that such activities were disrupting college operations and must cease, further demonstrations and defiant actions in support of the sit-in movement were carried out by large numbers of students, led by plaintiffs, among others; that, after the president had reported his inability to control future disruptions and demonstrations, the board expelled nine students, including plaintiffs, and placed twenty others on probation; and that no formal charges were placed against them, no hearing was granted to them, and no specific reason for expulsion was given to them. Finding that it had jurisdiction, the court stated that the only question in the case was whether the plaintiffs had been accorded constitutional due process in the expulsion. It was held that the right to matriculate in a public college or university is conditioned upon an individual student's compliance with the institution's regulations; that the governing board thereof has authority to establish reasonable regulations; and that regulations reserving to a college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution are valid so long as the dismissal is not arbitrary and falls within the classes specified for preserving ideals of scholarship or moral atmosphere. Also, it was held that the Fourteenth Amendment does not require formal charges and/or a hearing prior to expulsion by school authorities. From the evidence the court concluded that plaintiffs' conduct was "calculated to provoke and did provoke discord, disorder, disturbance and disruption" of the campus and classrooms; that persisting in such conduct after warning by the president was "flagrantly in violation of college regulations, was prejudicial to the school, constituted insubordination, resulted in inciting other students to like conduct, and, in general, was conduct unbecoming a student or future teacher in the schools;" that defendants' action was justified and necessary to operate the college in a proper manner; that the expulsion was in the good faith exercise of authority held by the board and not arbitrary; and that such action did not operate to deprive plaintiffs of rights guaranteed by the federal constitution. Injunctive relief was therefore denied.

JOHNSON, District Judge.

This case is now submitted upon the issues made up by the pleadings, the evidence taken orally before the Court, the several exhibits introduced and admitted, and the briefs of the parties. This Court upon this submission now proceeds in this memorandum opinion, as authorized by Rule 52 of the Federal Rules of Civil Procedure, to make the appropriate findings of fact and conclusions of law.

This action is brought by six Negroes who were formerly students at the Alabama State College, Montgomery, Alabama, seeking a preliminary and permanent injunction to restrain the Alabama State Board of Education, the individual members of that Board, including the Governor as ex-officio chairman, the Alabama State College, and H. Councill Trenholm, as president of the Alabama State College, their agents, representatives, employees, assigns, and successors, from obstructing, hindering, preventing, and otherwise interfering with the plaintiffs' right to attend the Alabama State College in Montgomery, Alabama, as students. Plaintiffs invoke the jurisdiction of this Court under Title

28, §§ 1331 and 1343 of the United States Code. Generally, the plaintiffs' complaint avers that they were students in good standing at the Alabama State College and remained so until they entered a publicly owned lunchroom in the Montgomery County Courthouse on or about February 25, 1960, after which and because of which the defendant State Board of Education expelled each of them from the college. The plaintiffs aver that the defendants' action in expelling them was taken without regard to any valid rule or regulation concerning student conduct and was nothing more than a retaliation against, punishment against, and intimidation toward them for having lawfully sought service in a publicly owned lunchroom, which service they had a legal right to seek. Plaintiffs aver they were summarily expelled without notice or opportunity to defend against the charges; that said action by the State Board of Education was arbitrary and in violation of their constitutional rights.

[Facts Reviewed]

On the 25th day of February, 1960, the six plaintiffs in this case were students in good

standing at the Alabama State College for Negroes in Montgomery, Alabama. This college is a state owned and operated institution of higher learning for prospective Negro school teachers; the college is owned by the State of Alabama, and maintained and operated with state funds. The State Board of Education is authorized to control and manage this and several other teacher-college institutions.<sup>1</sup> The State Board of Education has the authority, upon the recommendation of the State Superintendent of Education, to make the rules and regulations for the government of the school.<sup>2</sup> On this date, approximately twenty-nine Negro students, including these six plaintiffs, according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served. Service was refused; the lunchroom was closed; the Negroes refused to leave; police authorities were summoned; and the Negroes were ordered outside where they remained in the corridor of the courthouse for approximately one hour. On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president's position he would consider expulsion and/or other appropriate disciplinary action. On February 26, 1960, several hundred Negro students from the Alabama State College, including several if not all of these plaintiffs, staged a mass attendance at a trial being held in the Montgomery County Courthouse, involving the perjury prosecution of a fellow student. After the trial these students filed two by two from the courthouse and marched through the city approximately two miles back to the college. On February 27, 1960, several hundred Negro students from this school, including several if not all of the plaintiffs in this case, staged mass demonstrations in Mont-

gomery and Tuskegee, Alabama. On this same date, Dr. Trenholm advised all of the student body that these demonstrations and meetings were disrupting the orderly conduct of the business at the college and were affecting the work of the other students, as well as the work of the participating students. Dr. Trenholm personally warned plaintiffs Bernard Lee, Joseph Peterson and Elroy Embry, to cease these disruptive demonstrations immediately, and advised the members of the student body at the Alabama State College to behave themselves and return to their classes. On this same date, Bernard Lee filed a petition with the Governor of the State of Alabama protesting certain statements attributed to the Governor by the press.<sup>3</sup>

#### [Demonstrations Held]

On or about March 1, 1960, approximately six hundred students of the Alabama State College engaged in hymn singing and speech making on the steps of the State Capitol. Plaintiff Bernard

#### 3. "STUDENTS PETITION THE GOVERNOR

"To the Honorable Governor John Patterson

"We have taken cognizance of your mandate to President H. Council Trenholm of Alabama State College to dismiss from the School those students who participated in the sitdown strike at the County Court House snack-bar, Thursday, February 25, 1960.

"We, a united group of students of said college, humbly request that you reconsider your order to President Trenholm. This decision is out of tune with the spirit of true Americanism. The snack-bar at the Court House is a symbol of injustice to a part of the citizens of Montgomery. It is a flagrant contradiction of the Christian and Democratic ideals of our nation.

"We went to the snack-bar not as hoodlums, but in the same manner and spirit in which other college and university students have done in other parts of the country. Our purpose was to express our resentment to a scheme that fails to recognize its responsibility to decent and orderly persons of all creeds, colors or nationalities. Honorable Sir, we did not violate any laws. We did not disturb the peace. We did not disobey the order of the law enforcement officers. Our behavior was in line with what we have been taught. We know you recognize the facts of history in the area of necessary social changes. We grow because of the freedom of individual and group expression in the forms of petition and protest.

• • •

"We have no desire for a prolonged and bitter struggle. But we shall not yield our rights and student-destiny without an extreme effort to retain them. The way we take, we do not know, but our way shall be directed by moral and spiritual designs. Our cause is just. We are asking that you study it with an open mind and give President Trenholm the authority to settle this issue with us.

"We are reasonable and considerate. We may be crushed, but we shall not bow to tyranny."

1. Section 433, Title 52, 1940 Code of Alabama, as amended:

"§ 433. *Control.*—The state board of education shall have the control and management of the several teachers' colleges of the state, for white teachers, located at Florence, Jacksonville, Livingston, Troy, and of the Alabama State College for Negroes located at Montgomery."

2. Section 439, Title 52, 1940 Code of Alabama, as amended.



Lee addressed students at this demonstration, and the demonstration was attended by several if not all of the plaintiffs. Plaintiff Bernard Lee at this time called on the students to strike and boycott the college if any students were expelled because of these demonstrations.

Investigations into this conduct were made by Dr. Trenholm, as president of the Alabama State College, the Director of Public Safety for the State of Alabama under directions of the Governor, and by the investigative staff of the Attorney General for the State of Alabama.

On or about March 2, 1960, the State Board of Education met and received reports from the Governor of the State of Alabama, which reports embodied the investigations that had been made and which reports identified these six plaintiffs, together with several others, as the "ring leaders" for the group of students that had been participating in the above-recited activities. During this meeting, Dr. Trenholm, in his capacity as president of the college, reported to the assembled members of the State Board of Education that the action of these students in demonstrating on the college campus and in certain downtown areas was having a disruptive influence on the work of the other students at the college and upon the orderly operation of the college in general. Dr. Trenholm further reported to the Board that, in his opinion, he as president of the college could not control future disruptions and demonstrations. There were twenty-nine of the Negro students identified as the core of the organization that was responsible for these demonstrations. This group of twenty-nine included these six plaintiffs. After hearing these reports and recommendations and upon the recommendation of the Governor as chairman of the Board, the Board voted unanimously, expelling nine students, including these six plaintiffs, and placing twenty students on probation. This action was taken by Dr. Trenholm as president of the college, acting pursuant to the instructions of the State Board of Education. Each of these plaintiffs, together with the other students expelled, was officially notified of his expulsion on March 4th or 5th, 1960.<sup>4</sup> No formal charges were placed against these students and

no hearing was granted any of them prior to their expulsion. On or about March 3, 1960, approximately two thousand Negro students staged a meeting at a church near the college campus. These plaintiffs, or at least a majority of them, were leaders in this demonstration. At this time the State School Board and the college administration were criticized and denounced.<sup>5</sup>

State Board of Education considered this problem of Alabama State College at its meeting on this past Wednesday afternoon. You were one of the students involved in this expulsion-directive by the State Board of Education. I was directed to proceed accordingly.

"On Friday of last week, I had made the recommendation that any subsequently-confirmed action would not be effective until the close of this 1960 Winter Quarter so that each student could thus have the opportunity to take this quarter's examinations and to qualify for as much QH-Pt credit as possible for the 1960 Winter Quarter.

"The State Board of Education, which is made responsible for the supervision of the six higher institutions at Montgomery, Normal, Florence, Jacksonville, Livingston, and Troy (each of the other three institutions at Tuscaloosa, Auburn and Montevallo having separate boards) includes the following in its regulations (as carried on page 32 of THE 1958-59 REGISTRATION-ANNOUNCEMENT OF ALABAMA STATE COLLEGE)

"Pupils may be expelled from any of the Colleges:

- a. For willful disobedience to the rules and regulations established for the conduct of the schools.
  - b. For willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.
  - c. FOR CONDUCT PREJUDICIAL TO THE SCHOOL AND FOR CONDUCT UNBECOMING A STUDENT OR FUTURE TEACHER IN SCHOOLS OF ALABAMA, FOR INSUBORDINATION AND INSURRECTION, OR FOR INCITING OTHER PUPILS TO LIKE CONDUCT.
  - d. For any conduct involving moral turpitude."
5. The action of the Board is accurately reflected in plaintiffs' Exhibit 3, which reports the recommendation made to the Board by the Governor:

"After a full investigation of the demonstrations carried on by the students of the Alabama State College for Negroes and after careful consideration of the evidence obtained as a result of the investigation, I recommend that the following action be taken:

- "1. That the following students be expelled:  
Bernard Lee, Norfolk, Virginia  
St. John Dixon, National City, California  
Edward E. Jones, Pittsburg, Pennsylvania  
Leon Rice, Chicago, Illinois  
Howard Shipman, New York, New York  
Elroy Emory, Ragland, Alabama  
James McFadden, Prichard, Alabama  
Joseph Peterson, Newcastle, Alabama  
Marzette Watts, Montgomery, Alabama

- "2. That the following students be placed on probation and allowed to remain in school pending good behavior:  
Henry Allen, Seale, Alabama; Richard Ball,

4. Letter from Alabama State College, Montgomery, Alabama, dated March 4, 1960, signed by H. Council Trenholm, President:

"Dear Sir:

"This communication is the official notification of your expulsion from Alabama State College as of the end of the 1960 Winter Quarter.

"As reported through the various newsmedia, The

### [The Law Is Settled]

The law is now too well settled and the authorities are now too numerous for this Court to spend any considerable time on the various defenses herein raised by these defendants challenging the jurisdiction of this Court to hear and decide this type controversy. It suffices to say that jurisdiction is clearly vested by Title 28, §§ 1331 and 1343 (3).<sup>6</sup> The various objections raised by these defendants as to the insufficiency of process and that this action is prohibited by the Eleventh Amendment to the Constitution of the United States are frivolous and merit no discussion. See this Court's opinion and the author-

Fairfield, Alabama; Willis C. Battle, Phenix City, Ala.; Cornelius Benson, Birmingham, Alabama; Samuel Bouie, Anniston, Alabama; Floyd Coleman, Sawyerville, Alabama; Henry Crawford, Montgomery, Alabama; James Earl Davis, Prichard, Alabama; Thomas C. Ervin, Heflin, Alabama; Arthur Lee Foster, Montgomery, Ala.; Isham Harris, Troy, Ala.; Jonathan Hicks, Chatoom, Ala.; Trenholm Hope, Selma, Alabama; Jerry Leon Johnson, Collinsville, Alabama; Andrew William Jones, Birmingham, Ala.; Eddie Lee McSwain, Eufaula, Alabama; Theophilus Moody, Camden, Alabama; Joe Louis Reed, Evergreen, Ala.; William Renfroe, Roba, Alabama; Robert Lee Woods, Heiberger, Alabama.

"3. That all other members of the student body be advised that they will be expected to behave themselves and obey the law and that any future conduct on their part which is in violation of the law or calculated to incite riots and disorders will result in their immediate dismissal from the school.

/s/ JOHN PATTERSON"

### 6. "§ 1331. Federal question . . .

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

"(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

### "§ 1343. Civil rights . . .

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

ities cited therein in *In re Wallace*, 170 F. Supp. 63.

The only real question in this case is whether these plaintiffs were accorded "due process" within the meaning of the Constitution of the United States in their expulsion from the Alabama State College by the Alabama State Board of Education.

### [Right to Attend College]

The right to attend a public college or university is not in and of itself a constitutional right. *Waugh v. Board of Trustees, etc.*, 237 U.S. 589; *Hamilton, et al. v. Regents of the University of California, et al.*, 293 U.S. 245. The right to attend and matriculate in a public college or university is conditioned upon an individual student's compliance with the rules and regulations of the institution. The governing board, which in this instance is the State Board of Education, has the authority to establish reasonable rules and regulations for the government of the institution that is committed to its care. The regulations governing students at the Alabama State College for Negroes, which were enacted by the State Board of Education and published in the college catalogue and distributed to all students prior to their enrollment, read, in part, as follows:

"Attendance at any college is on the basis of a mutual decision of the student's parents and of the college. Attendance at a particular college is voluntary and is different from attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult. Alabama State College seeks to give maximum service to every student who evidences a sincere willingness to accept the leadership and supervision of the college. The college is given authority and is made responsible for the administration of the regulations as set up by the State Board of Alabama. Some excerpts from these official regulations are as follows:

"Every pupil, in addition to complying

with the requirements fixed by this Board for entrance into said school, will be required to render strict obedience to all the rules and regulations, for the government of the school and for the conduct of the pupils thereof. The pupils shall conduct themselves in a manner becoming future teachers in the public schools of Alabama, and will be expected to show a spirit of loyalty to the institution they attend, and give willing and ready obedience to the President and faculty in charge of the school. Acts of insubordination, defiance of authority, and conduct prejudicial to discipline and the welfare of the school will constitute grounds for suspension or expulsion from schools.

"Pupils may be expelled from any of the Colleges:

- a. For willful disobedience to the rules and regulations established for the conduct of the schools.
- b. For willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.
- c. For conduct prejudicial to the school and for conduct unbecoming a student or future teacher in schools of Alabama, for insubordination and insurrection, or for inciting other pupils to like conduct.
- d. For any conduct involving moral turpitude."

These rules and regulations were promulgated in 1935, and apply to all colleges under the management and control of the State Board of Education. The courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution. This is true as long as the dismissal is not arbitrary and falls within the classes specified for preserving ideals of scholarship or moral atmosphere. *Waugh v. Board of Trustees*, supra; *Hamilton v. Regents of the University of California*, supra; *Lucy v. Board of Trustees, etc.*, D.C.N.D. Ala., C.A. No. 652; and the authorities referred to in 14 C.J.S., Colleges and Universities, § 26 pp. 1360-1363; 79 C.J.S., Schools and School Districts, § 503-b, pp. 449-450; and 55 Am. Jur., Universities and Colleges, § 22, p. 15.

### [Elementary School Cases]

Those cases cited by the plaintiffs to this Court which deal with elementary schools requiring compulsory attendance as opposed to state educational institutions of higher learning, permitting attendance upon a basis of mutual agreement, are not applicable in this case.<sup>7</sup> Plaintiffs' complaint that they were expelled without formal charges and without having the opportunity of a hearing and that such action was in violation of their rights under the due process clause of the Fourteenth Amendment is not sustained by the majority of the applicable authorities.<sup>8</sup> These many decisions that are contrary to plaintiffs' contention as to this aspect of the case have been criticized,<sup>9</sup> but the fact remains where there is no statute or rules that requires formal charges and/or a hearing, as is the case in Alabama, the prevailing law does not require the presentation of formal charges or a hearing prior to expulsion by the school authorities.

In appraising all the testimony in this case, together with the several exhibits, this Court reaches the firm conclusion that these several plaintiffs in organizing their group and then presenting themselves at the public eating establishment on February 25, 1960, had as their primary purpose the protesting of the discrimination (because of color) on the part of that public eating establishment and others in this area, and had as their aim the intention of focusing public attention upon themselves and upon that discrimination. The obtaining of service was only incidental to those objectives. This Court is of the further opinion that the series of demonstrations, speeches, news releases, petitions, and resolutions that followed the initial demonstration and occurred prior to the expulsion of these plaintiffs was for the same purpose. This Court is of the firm opinion that these plaintiffs, in their zeal to focus public attention upon this area and what they considered to be illegal discrimination as to the members of their race by certain public officials in this area, acted without regard to their status as students at the Alabama State College and acted without considering the damage they were doing to the orderly operation of the Alabama State College during this period.

7. *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U.S. 624.

8. See the annotation in 58 ALR 2d 903-920.

9. See "Dismissal of Students: 'Due Process'", 70 Harvard Law Review 1406.

### [Findings and Conclusions]

This Court further finds and concludes in this case that the conduct of these plaintiffs and other students of the Alabama State College from February 25, 1960, until they were expelled or probated on March 5, 1960, in organizing, leading and actively participating in the several demonstrations, was calculated to provoke and did provoke discord, disorder, disturbance and disruption on the campus of the college and in the college classrooms, generally. This Court further finds and concludes that the conduct of these plaintiffs in persisting after warning by the president of the college was flagrantly in violation of the college rules and regulations, was prejudicial to the school, constituted insubordination, resulted in inciting other pupils to like conduct, and, in general, was conduct unbecoming a student or future teacher in the schools. This Court is of the further conclusion that the action taken by the defendants as members of the State Board of Education and as officials of the Alabama State College was justified and, in fact, necessary in order that the college could operate and be operated in a proper manner. It is further concluded that the expulsion of these plaintiffs was in good faith, was in the exercise of the authority of the governing board of the Alabama State College, and was not an arbitrary action. It necessarily follows that such action did not operate to deprive any of these plaintiffs of their constitutional rights guaranteed them by the Constitution of the United States.

The pertinent observations, findings and conclusions of this Court, as herein recited, are not to be construed as either an approval or disapproval of the so-called "sit-in" demonstrations; the legality of such actions is not here involved. Nor is anything stated or concluded herein to be construed as an approval or condonation of the operation of publicly owned and maintained lunchrooms where there is practiced discrimination solely on the basis of race in violation of the settled law in *Derrington, et al. v. Plummer, et al.*, (CCA 5, 1956), 240 F. 2d 922, cert. den. 353 U.S. 924; *City of Greensboro, et al. v. Simkins, et al.*, 246 F. 2d 425; and *Department of Conservation and Development, etc., et al. v. Tate, et al.*, 231 F. 2d 615.

An appropriate order will be made and entered, in accordance with the foregoing.

### ORDER AND JUDGMENT

The defendants having filed herein on August 1, 1960, their motion to dismiss, and having filed an amended motion to dismiss on August 19, 1960, and their motion to strike certain portions of plaintiffs' complaint and exhibits thereto, on August 1, 1960, and having filed a motion for judgment on the pleadings on August 22, 1960, and having filed at the close of plaintiffs' case a motion to dismiss, which motion is filed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, and this Court having reserved ruling upon each of said motions until after the presentation of the testimony by both sides to this litigation, this Court now, for the several reasons set out in the Court's written opinion made and filed herein on this date, considers and concludes that each of defendants' said motions should be overruled and denied.

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that the defendants' motions to dismiss filed herein on August 1, 1960 and amended August 19, 1960, motion to strike filed herein on August 1, 1960, motion for judgment on the pleadings filed herein on August 22, 1960, motion to dismiss filed at the close of plaintiffs' case, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, be and each is hereby overruled and denied.

For the several reasons set forth in said written opinion of this Court filed herein on this date, it is the further ORDER, JUDGMENT and DECREE of this Court that plaintiffs' motion for a preliminary injunction and plaintiffs' motion and prayer for a permanent injunction, filed herein on July 13, 1960, wherein plaintiffs seek to have this Court restrain the defendants Alabama State Board of Education and Alabama State College, and their agents, employees, and/or successors in office, from preventing or interfering with the plaintiffs' right to attend the Alabama State College in Montgomery, Alabama, as students, be and each is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the costs of this litigation be and they are hereby taxed against the plaintiffs, for which execution may issue.



## EDUCATION

## Colleges and Universities—Texas

Margaret E. ALLRED et al. v. H. L. HEATON et al.

Court of Civil Appeals of Texas, Waco, May 19, 1960, on Motions for Rehearing June 9, 1960, 336 S.W.2d 251.

**SUMMARY:** Because the Agricultural and Mechanical College of Texas (A&M) is not co-educational, the registrar refused to furnish information requested by a woman indicating a desire to study law there. An attorney acting for her and for three other women also desiring to enroll there stated that his clients would not perform the "vain act" of presenting themselves personally for enrollment unless officially notified that they would be considered for admission regardless of sex, but he requested application forms and instructions if upon proof of other qualifications they would be accepted. In response, the registrar sent four application forms "not subject to any matter or condition." Three of the women brought an action individually and as a class, in a state district court, seeking a declaratory judgment that the regulation barring women is repugnant to the Fourteenth Amendment and requesting an injunction prohibiting its enforcement. It was alleged that the plaintiff who had previously indicated an interest in law wished to obtain a degree in floriculture, which only this college among state institutions offered. From an adverse judgment, plaintiffs appealed to the court of civil appeals, which affirmed. It was held that the trial court erred in permitting the suit to be brought as a class action since it was not shown that plaintiffs were authorized to bring suit for anyone else, that women as a class wish to be enrolled in the college, nor that any other woman in Texas wished to obtain a degree in floriculture in the college. As a suit by individuals who wished for the sake of convenience and economy to attend this particular state college because it is the nearest one to their homes, the court held that constitutionally they were being treated no differently from students residing in other communities distant from any state-supported college. It was also emphasized that the military program at A&M organizing the men on a corps basis under constant military discipline made it the only state-supported military college in Texas, causing it to be operated and universally recognized as a young men's college. The court distinguished *State of Missouri ex rel. Gaines v. Canada* [305 U.S. 337 (1938)] on the grounds: (1) that the discrimination against the Negro who wished to study law in the only state-supported law school in his state in that case was based on color and/or race rather than sex; (2) that the plaintiff in that case had been refused admission to the school involved, whereas it can not be judicially assumed here that the plaintiffs desired to enter A&M College when they had not made application, and therefore no justiciable controversy was presented; and (3) that the plaintiff's desire in that case to study law in a state school was unmixed with other purposes, whereas the plaintiff here who wished to study floriculture at A&M was also influenced by its convenient location and low cost to her. On motion for rehearing, the court ordered stricken, as dictum, a statement in its original opinion that "[I]n view of the decision . . . in *Gaines v. Canada* . . . in the event Miss Allred makes application to A&M College to pursue a course of study leading to a degree in floriculture . . . she should be permitted to do so, and not be excluded solely on the ground that she is a member of the female sex." [See also, *Heaton v. Bristol*, 317 S.W.2d 86, 4 Race Rel. L. Rep. 302 (Tex. Civ. App. 1958); *cert. denied*, 359 U.S. 999, 4 Race Rel. L. Rep. 12 (1959)].

TIREY, Justice.

This is an appeal from the judgment of the district court of Brazos County denying appellants an injunction against appellees for refusing admission to appellants to enroll in the Agricultural and Mechanical College of Texas.

The cause was tried without the aid of a jury, and partly on stipulations filed to be made a part of the statement of facts. In the decree we find this recital:

"Whereupon the plaintiffs moved in open court for leave to proceed with a class action, as well as for the plaintiffs individ-

ually, under Rule 42, T. R. C. P.; and the Court, after considering the motion and hearing evidence in support thereof, including the stipulations filed herein, in all things permitted the class action as a true and a spurious class action for the benefit of all Texas women similarly situated, as permitted by law; and defendants' special exception having been overruled by the Court, to which exception was duly made, all parties then announced ready for trial, subject to the special exception filed herein."

[Fact Findings, Conclusions of Law]

We quote the findings of fact and conclusions of law recited in the judgment:

"(a) That the Agricultural and Mechanical College of Texas is a land grant college established by State and Federal Law, fully owned and operated by the State of Texas.

"(b) That the plaintiffs are *bona fide* female resident citizens of the City of Bryan, of the State of Texas, and of the United States of America.

"(c) That the plaintiffs each bring this action individually and as a class action under Rule 42 in good faith and that the degree programs and courses asked for here, at all times material to this case, are the genuine, lawful desire and to the best interest of each plaintiff under the circumstances.

"(d) That Mary Ann Parker desires to study at the College for a degree in Architecture; that Sarah C. Hutto desires to study at the College for a degree in Science with a major in Biology; and that Margaret E. Allred desires to study at the College for a degree in the program and courses in Floriculture at the School of Agriculture, as prescribed, all as undergraduates; that all requests and demands are real, genuine, and made in good faith for sufficient reasons.

"(e) That the College refuses to admit any women as students during regular sessions regardless of their qualifications or educational abilities, and that specific or detailed proof of educational qualifications by the usual application is futile and unnecessary for women in view of the involved Resolution of September 3, 1925, and the type of relief prayed for herein.

"(f) That plaintiffs have done all things reasonable or possible for admission while

the exclusionary Resolution is being enforced and is effective; that they were advised by the Registrar that women would in no event be admitted to the College as students; and that a real, genuine, and justifiable controversy exists between the plaintiffs and defendants, who are authorized and qualified presently to bring this suit, which is proper in form and substance.

"(g) That the College is suited and adapted for the education of women as well as of men, and the exclusionary Resolution is without reasonable relation to the educational objectives of the College.

"(h) That the military program at the College forms no reasonable basis for the exclusions of women from other courses of study in the School, since, *inter alia*, R.O.T.C. is necessarily offered only to certain young men, and about 3500 students of the College are now not required to study or be connected with military or air training.

"(i) That plaintiffs will be unreasonably deprived and damaged if they are required to remove to another place to obtain the college courses they desire and request at this school.

"(j) That the A. and M. College of Texas is the only institution in Texas offering degree programs in Floriculture, and that Margaret E. Allred is totally deprived of effective study and a degree or major in such fields unless she leaves Texas to study.

"(k) That many courses and degree programs are offered at the College which are offered nowhere else in Texas, as listed in the stipulations and Statement of Facts herein, suitable and valuable to women as a class.

"(l) That plaintiffs and women as a class are barred *in limine* by the Resolution from fair and reasonable consideration for admission to the school solely because of their sex, causing any further attempt to enroll under present circumstances to be a vain and useless act.

"(m) That the nature, scope, and extent of the College are fully shown by its Graduate and Undergraduate Bulletins or catalogues introduced in evidence and the stipulations in evidence.

"(n) That women have been excluded from the school, with rare exceptions, except

for summer instruction, since its beginning in 1876, but that the reasons for their exclusion no longer exist.

"(o) That women, especially the individual plaintiffs, are not accorded substantial equality in higher education by reason of the exclusionary Resolution, considering the extent, scope, cost, and nature of the A. and M. College of Texas and its offering of various courses obtainable nowhere else in Texas.

"(p) That except for the exclusionary Resolution the plaintiffs and women as a class would be able to present and determine their eligibility for admission as students fairly and with meaning.

"No implied fact findings are made against plaintiffs."

*[Points of Attack on Decree]*

The decree is assailed on six points; they are substantially to the effect that the trial court erred in upholding as valid the exclusionary Resolution of the Board of Directors of the Agricultural and Mechanical College of Texas;

(1) attacked in this case, and thereby denying plaintiffs the relief sought, said exclusionary Resolution on its face being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution;

(2) attacked in this case, and thereby denying plaintiffs the relief sought, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is construed and applied to the female plaintiffs and Texas women as a class;

(3) attacked in this case, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is applied to plaintiff Margaret E. Allred, seeking a degree-program in floriculture, which is offered at no other college or university in Texas;

(4) attacked in this case, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is applied to women as a class desiring to study the named subjects offered at no other state college or university in Texas;

(5) in denying the relief sought by plaintiffs under the Declaratory Judgment Act, Vernon's Ann.Civ.St. art. 2524-1 et seq.;

(6) in denying the injunction restraining the

defendants from enforcing the exclusionary Resolution, all necessary facts having been shown entitling plaintiffs to the relief sought as a matter of right.

*[Stipulations Quoted]*

A comprehensive statement is necessary. We quote paragraphs one through nine (also twelve) of the Stipulations:

"1. Plaintiff, Margaret Elizabeth Allred, is 18 years of age, a resident of Bryan, Brazos County, Texas, and is presently attending Texas Technological College at Lubbock, Lubbock County, Texas. Margaret Elizabeth Allred desires to enroll as a student at the Agricultural and Mechanical College of Texas subject to her qualifications for entry other than sex. She desires to study as an under-graduate for a degree in floriculture. She desires to attend the Agricultural and Mechanical College of Texas to obtain that course of study and because it is more convenient and less costly for her than attendance at any other institution of higher learning because it is nearer her home. If she resided near any other senior State supported college or university in Texas, she would probably desire to attend the school nearest her home. In June, 1959, Margaret Elizabeth Allred made application for admission to a summer session of the Agricultural and Mechanical College of Texas and stated that the course of study she was pursuing or expected to pursue in the Agricultural and Mechanical College of Texas was law.

"2. Plaintiff, Sarah C. Hutto, is 22 years of age, divorced, with one minor child to support. She resides in Bryan, Brazos County, Texas, and is presently attending Allen Military Academy at Bryan, Brazos County, Texas. She desires to enroll as an under-graduate for a degree in biology as a major, subject to her qualifications for entry other than sex. She desires to attend the Agricultural and Mechanical College of Texas to obtain that course of study and because it is more convenient and less costly for her than attendance at any other school because it is nearer her home. If she resided near any other senior State supported college or university in Texas, she would probably desire to attend the school nearest her home.

"3. Plaintiff, Mary Ann Parker, is 39 years

of age, married, has two children, one 17 years of age and one 11 years of age. She resides at her home in Bryan, Brazos County, Texas, with her husband, M. L. Parker, Jr., and their two children. She is not attending any college or university at the present time. She desires to study for a degree in architecture. She desires to attend the Agricultural and Mechanical College of Texas to obtain the course of study because it is more convenient and less costly for her than attendance at another institution of higher learning because it is nearer her home. If she lived near any other State supported college or university in Texas, she would probably desire to attend the school nearest her home. Her husband is in the general contracting business at Bryan, Brazos County, Texas, and is part owner of Andrews-Parker, Inc., General Contractors. All three women plaintiffs are graduates of accredited Texas high schools.

"4. Defendant, M. T. Harrington, is Chancellor of the Agricultural and Mechanical College of Texas System. Defendant, Earl Rudder, is President of the Agricultural and Mechanical College of Texas. Defendant H. L. Heaton is Director of Admissions and Registrar of the Agricultural and Mechanical College of Texas. Defendants H. B. Zachry, A. E. Cudlipp, L. H. Ridout, Price Camobell, Herman F. Heep, Eugene B. Darby, Sterling C. Evans, John Newton, and S. B. Whittenburg are members and constitute the Board of Directors of the Agricultural and Mechanical College of Texas.

"5. The Agricultural and Mechanical College of Texas is the oldest State supported institution of higher learning.

"6. The Agricultural and Mechanical College of Texas began operation in October, 1876, and has been in continuous operation since that time.

"7. The Agricultural and Mechanical College of Texas is one of seven State supported military colleges in the United States. It is the only State supported military college in the State of Texas. The military program at the Agricultural and Mechanical College of Texas differs from the reserve officers program offered at various other State colleges and universities. The participants in the military program at the Agricultural and Mechanical College of Texas are or-

ganized on a corps basis; the men are organized into military units and they are constantly under military discipline, twenty-four hours a day, seven days a week.

"8. The Agricultural and Mechanical College of Texas, since its beginning, has operated and been universally recognized and accepted as a school for the training and education of young men. The Board of Directors of the Agricultural and Mechanical College of Texas has governed the Agricultural and Mechanical College of Texas with the view that it was vested with discretionary power to exclude female students, and the Legislature of the State of Texas since the beginning of the Agricultural and Mechanical College of Texas has acquiesced in the Board of Directors' concept of its authority. Through the years the Board of Directors of the Agricultural and Mechanical College of Texas has passed a number of resolutions relating to the policy of excluding women from the Agricultural and Mechanical College of Texas. The Board of Directors of the Agricultural and Mechanical College of Texas has not altered its long observed policy of excluding women students from the regular sessions of the Agricultural and Mechanical College of Texas.

"9. The Texas system of higher education as it exists today is comprised of 18 institutions fully supported by State funds. Each of these institutions, with the exception of the Agricultural and Mechanical College of Texas and Texas Woman's University, is open to both sexes and has remained open to qualified members of each sex since the date of founding. \* \* \*

"12. Pursuant to Articles 2610 and 2613(6) of the Texas Statutes, and pursuant to Texas law generally, conferring government and control of the College upon the Board of Directors, women are excluded as students by the Board, except for summer school instruction, under a Resolution or Regulations dated September 3, 1925, amended February 23, 1926, recorded in Volume 6, pp. 46 and 66. Official Minutes of the Board of Directors of the College, which regulations or resolutions have never been repealed, impaired, or rescinded, and they are still effective and enforced actions of the Board to date and at all times material to this suit, copies of said attacked Resolu-



tions or Regulations being attached hereto and made a part hereof."

*[Correspondence With Registrar]*

On July 16, 1959, the Honorable John M. Barron, counsel for appellees, wrote Mr. Heaton, Director of Admissions, Texas A. & M. College, substantially as follows:

Has there been any change or alteration in the Board's Resolution excluding women students from the regular terms of the College for undergraduate work?

If you feel that you cannot answer this question, I am wondering whether you would make the official records available to me for inspection, so I might make the determination myself.

On July 17, 1959, Mr. Heaton wrote Mr. Barron in reply, substantially as follows:

The official minutes of the Board of Directors do not indicate that the Board has altered its long observed policy of excluding women students from the regular sessions of the College.

On August 19, 1959, the Associate Registrar of A. & M. College, wrote appellant, Miss Allred, substantially as follows:

Your recent request has been interpreted as an indication that you may wish to enroll at the A. & M. College of Texas. We appreciate your interest but wish to advise that our school is not a coeducational institution. In view of this situation, we are not sending the information as requested in your recent communication.

*[Notice Given]*

On August 25, 1959, Mr. Barron wrote Mr. Heaton, as follows:

"As one of the legal counsel for several women who desire to enter A. & M. College as students during the regular sessions, beginning at the next session about to begin, I wish to notify you that the ladies are ready to present their credentials, transcripts of credits and all other information to prove their educational, moral and other necessary qualifications for under-graduate study at the College. This notice is given pursuant to directions in the Bulletin, and we desire

that you send all necessary forms, instructions, etc., subject to the following matters contained in this letter.

"As usual, the Bulletin contains the express provision that only male students will be accepted for admission, and we recognize that the College stands upon that provision as a lawful regulation. But we disagree and are ready, and now tender, any and all information and proofs necessary for admission to the school by these ladies, save and except the proof that such applicants are men instead of women.

"Upon your request or notification to me, they shall be glad to furnish names, desired courses of study and any and all information required by the College. In view, however, of the position taken in the past, the women will not perform the vain act of presenting themselves personally at your office, unless you or some authorized officer notifies me that they will be considered for admission regardless of sex, since that bar is at the threshold of this action.

"If the College will accept the women upon proof of qualifications considering the above, please send the necessary applications and instructions and they will be glad to comply with the regulations of the College for admission. At least four applications will be needed. . . ."

In reply to that letter Mr. Heaton, on September 2, 1959, wrote Mr. Barron substantially as follows:

Receipt of your letter of August 25, 1959, is acknowledged. As a courtesy only, and not subject to any matter or condition, I am transmitting herewith four formal application forms.

*[Registrar's Response Interpreted]*

On September 3, 1959, Mr. Barron wrote Mr. Heaton substantially as follows:

Thank you for sending four application blanks. However, since you refuse to state that the women will be considered for admission, as outlined in my letter of August 25, in view of the Resolution excluding them, your letter to me of July 17, 1959, and your absolute refusal to consider Miss Margaret E. Allred by your letter to her of August 19, 1959, it will be necessary to file

suit to attempt to remove the bar against women as a class, and subject to the outcome of that suit, the women will again apply for admission. The women involved are Mary Anne Parker, Sarah E. Hutto, Margaret E. Allred and Mildred Barron, all of Bryan, Texas, as well as other women who desire to attend.

We are still ready to submit the proper applications when we are told that the Resolution will not be enforced or when it has been amended, or that the women will be in good faith considered for admission to the next regular fall session, without regard for sex. I consider at present, from past legal experience and from the above letters, that the answer as of today is an unequivocal "No".

Neither appellant filled out and signed the application blanks required by the college for entrance, nor did either appellant present herself in person to the college for admission for any course of study whatsoever but elected, through their attorney, to file this suit without having formally applied for entrance, and without having been rejected.

#### *[Allegations in Petition]*

Appellants went to trial on their original petition and supplemental petition, and in their original petition they alleged in part:

"I. The named Plaintiffs above bring this action for themselves individually, and also as a class action as permitted by law, particularly Rule 42. Texas Rules of Civil Procedure, there being a common question of law affecting higher educational rights of American women, and a common relief is sought for all other similarly situated. The issues and questions herein are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court.

"II. It is alleged that each of the above named Plaintiffs, excepting the pro forma joinder and the Next Friend, are female residents of the State of Texas and each of the Plaintiffs are interested in, and their rights and status are affected by, a statute or resolution promulgated by the Board of Directors of A. & M. College, which bars and excludes all female students from the

College, or which purports to do so. The Plaintiffs, desiring to attend or desiring to be considered for admission to A. & M. College without discrimination for undergraduate study, herein attack the Resolution or Regulation barring women from the College as being repugnant to the Fourteenth Amendment to the United States Constitution, and they seek to obtain a declaration that the involved Resolution or Regulation is void and in contravention thereof.

"III. Each Plaintiff is interested in the subject matter hereof and the validity or invalidity of the Resolution involved for the following reasons:

"(a) The Plaintiff, Margaret E. Allred, is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Arts Degree with a major in History and Government, and a degree in Floriculture in the School of Agriculture.

"(b) The Plaintiff, Sarah C. Hutto, is interested because she is a graduate of an accredited high school, and she seeks a Bachelor of Sciences Degree with major courses in Biology or Entomology.

"(c) The Plaintiff, Mary Ann Parker, is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Architecture Degree in the School of Engineering.

"The High School graduates above have completed at least 15 acceptable units, as provided for on Page 54 of the College Bulletin, and the students above with college credits are eligible to return to the original institution, they have a grade point ratio of 1.00 or better, and they are all willing to make the necessary proofs set forth in the bulletin at pages 54-58 thereof, and to pay all necessary fees and expenses after the exclusionary Resolution is no longer a hopeless bar, or alternatively, when the Resolution attacked here is no longer an absolute bar to the admission of women, since it would be vain to attempt the above until the discriminatory Resolution or Regulation is removed by the Court, as herein-after alleged. All of the Plaintiffs desire undergraduate study at the College, and all women, including Plaintiffs, are now disqualified, *in limine*, by reason of sex.

"Each of the Plaintiffs alleges that she is in good health and of good character; that each desires to obtain a college education and that A. & M. College is the best, least costly and most convenient and available place for each of them to obtain it. Further, each is willing and able to take all required oaths and comply with any requirements of the college or qualification as a student which are designed for females, including Military, Naval or Air training if courses suitable to women are offered, when they can be considered for admission without sex discrimination."

**[Relief Held Correctly Denied]**

We think the trial court correctly denied the relief prayed for by appellants (assuming that each applied for entrance and that each was rejected) for the reason that the exclusion of appellants from the Agricultural and Mechanical College of Texas was not violative of any constitutional right. First of all, each of the appellants desired to attend A. & M. College of Texas because it is more convenient and less costly to appellants than attendance at any other school because it is nearer their home and that if they resided near any other State supported college or university in Texas, they would probably attend the school nearest their home.

That was the exact situation in the case of *Heaton v. Bristol*, Tex. Civ. App., 317 S.W.2d 86, w. ref., certiorari denied 359 U.S. 230, 79 S.Ct. 802, 3 L.Ed.2d 765.

The Agricultural and Mechanical College of Texas is the oldest state supported institution of higher learning, and since the founding of the College it has been operated and universally recognized and accepted as a school for the training and education of young men. The Board of Directors has governed the College with the view that it was vested with discretionary power to exclude female students and the Legislature of the State of Texas, since the beginning of the school, has acquiesced in the Board's concept of its authority. The college is one of seven State supported military colleges in the United States. It is the only State supported military college in the State of Texas. The Military program at A. & M. College differs from the Reserve Officers' Training Program offered at various other state colleges and universities in a number of material respects. The participants in the military program at A. & M. College are organized on a

corps basis; the men are organized into military units, and they are constantly under military discipline, twenty-four hours a day, seven days a week. The Texas system of higher education, as it exists today, is comprised of 18 institutions fully supported by State funds. Each of these institutions, with the exception of A. & M. and Texas Women's University, is open to both sexes and has remained open to qualified members of each sex since the date of founding. The only distinguishing characteristics between the facts in the instant case and the facts involved in *Heaton v. Bristol*, are:

(1) In this case plaintiffs, Margaret E. Allred, Sarah C. Hutto and Mary Ann Parker, have brought this suit not only as individuals but have attempted to bring it as a class action, whereas in *Heaton v. Bristol*, supra, Lena Ann Bristol and Barbara Tittle did not attempt to bring the suit as a class action.

(2) The relief prayed for in the instant case by plaintiffs in the trial court was (a) declaratory judgment, and (b) injunction, whereas plaintiffs in *Heaton v. Bristol* prayed for declaratory judgment and mandamus.

(3) The instant case was tried partly on an agreed stipulation of facts, whereas the case in *Heaton v. Bristol* was not.

**[Initially No Reference to Floriculture]**

In stipulation 1, we find that Miss Allred (in June, 1959) "made application for admission to a summer session of the Agricultural and Mechanical College of Texas and stated that the course of study she was pursuing or expected to pursue in the Agricultural and Mechanical College of Texas was law." (Emphasis added.) There is nothing in the record to indicate that Miss Allred notified the College that she desired to enter for the purpose of obtaining a degree in floriculture. It is true that the plaintiffs, in their original petition on which they went to trial, specifically alleged that Miss Allred is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Arts Degree with a major in history and government, and a degree in floriculture in the School of Agriculture; that on trial of the case counsel for Miss Allred struck from the pleadings "the allegations for request for a degree in Government and History." But the undisputed fact still remains that the first notice that the college had that Miss Allred desired a

degree in floriculture was contained in the original petition. It is true that the plaintiffs alleged in their petition that they bring this action for themselves individually and as a class action but there is absolutely no proof in this record that either of the plaintiffs are authorized to bring this suit for any other person or persons except for themselves. There is absent any proof to the effect that women as a class in the State of Texas desire to be enrolled in the College, and there is no proof that any other woman in Texas, save and except Miss Allred, desires to obtain a degree at the College in floriculture. So, we are of the view that the proof wholly fails to sustain a class action. The foregoing situation exists without dispute as to the other plaintiffs. (Appellants, Hutto and Parker, have wholly failed to show that their status is different from the applicants in *Heaton v. Bristol*, supra; however, the applicants in the *Bristol* case did apply for entrance and were rejected). Moreover, since Miss Allred made application to attend the summer session on the ground that she desired to pursue a course of study in the college, and that the subject was law, and since she further stipulated that she desired to attend such college because it was more convenient and less costly than any other institution of higher learning, and because it is near her home, and further, that if she resided near any other State-supported college or university in Texas, she would probably attend the school nearest her home; these stipulations being uncontradicted by any evidence, bring her within the exact situation as the applicants in *Heaton v. Bristol*, supra. We think the foregoing undisputed factual situation shows conclusively that Miss Allred's (as well as co-plaintiffs') exclusion from the college was not violative of any of their constitutional rights. It is obvious that appellants, being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State-supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution. But, as we understand appellants' contention here, they base their right to relief on the doctrine announced by U. S. Supreme Court in the State of Missouri *ex rel. Gaines v. Canada*, reported in 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208. We have carefully considered this case and

do not believe that it is applicable and controlling to the undisputed factual situation here before us. The decision in that case was grounded on the factual situation that a Negro in the State of Missouri, who had graduated from Lincoln University, a state institution of Missouri for Negroes, had presented himself for enrollment at the University of Missouri for the purpose of pursuing a law degree (such course not being offered at Lincoln University) and the University of Missouri refused to admit him to the law school solely on the ground that he was a Negro. In other words, here was discrimination solely on the ground of color and/or race. That situation is non-existent here.

#### [*Gaines Case Distinguished*]

Moreover, we have this further distinction in the *Gaines* case and the case at bar. In the *Gaines* case the applicant made application for admission and the application was refused. In the case at bar, attorney for appellants requested four application blanks which were mailed to counsel, but counsel refused to have the applicants execute the application blanks and present them to the college on the ground that the resolution here attacked precluded the admission of women. So, here we have an attack made upon the college without the applicants having been refused admission to the college. Can this Court assume that the applicants desire to enter A. & M. College when they do not make application, and when their attorney elects to advise them not to do so? We think the answer is "No." Surely no justiciable controversy is here presented.

#### [*What Might Have Happened*]

We have no way of knowing what the school authorities of the College would have done if Miss Allred had applied for admission to the college for the sole purpose of pursuing a degree in floriculture. It is obvious that if Miss Allred is the only one who desires such a degree, that the management or the Board of Directors would have had authority to make an exception in her case, and we cannot speculate on what would have happened had the college been fully informed of her desires before she filed this suit for relief. In the *Gaines* case, supra, the applicant's desire to obtain a law degree was unmixed with any other purposes. Here, Miss Allred desires to attend the college, partly be-



cause she is in the vicinity, partly because it is more convenient for her, and partly because it is cheaper, and partly because (she alleges in her pleadings) she desires to obtain a degree in floriculture. So, her purpose to enter the college is not unmixed with other conditions, and we have no way of knowing what she would do or what her desires would be if she lived near other state supported schools. In fact, during the trial, she abandoned stipulation one to the effect that she desired to pursue the study of law. As we pointed out in *Heaton v. Bristol*, supra, sex, as a basis for legislative classification has been used with considerable frequency in both the statutes of the United States and of the several states. The range of this legislation covers such diverse subjects as jury service, voting rights, employment in certain pursuits, minimum wage and hour legislation and property rights. See numerous authorities cited on page 99 of 317 S.W.2d. Surely the Supreme Court of the United States will not attempt to interfere with the public policy of the sovereign states of this nation in the management and control of their respective educational systems so long as such systems do not discriminate against color or race. This Court is of the further view that the duty of the United States Government to train its militia for the protection of the public transcends any private desire of any particular citizen in the United States to take a course of study offered at one of the United States military academies, whether that course includes basic military science, veterinary medicine or floriculture. In keeping with the foregoing view, we also think that it is the duty and a function of the State in the exercise of its public policy to provide military training for its youth, if it elects to do so, for the protection of the public, and that this duty and the form it assumes transcends any private desire of any particular citizen to take a course of study offered at its state military college, however desirable its course of study may be.

#### [Class Action Improper]

Finally, we think the trial court erred in permitting this case to be brought as a class action, because appellants failed to show that the named plaintiffs were members of an eligible class and entitled to enroll as students in the Agricultural and Mechanical College of Texas as such. The appellees, in their original answer, averred:

"Without admitting Plaintiffs' eligibility, independently of sex, to enroll as students in the Agricultural and Mechanical College of Texas, and without admitting the eligibility of members of Plaintiffs' class, independently of sex, to enroll as students in the Agricultural and Mechanical College of Texas, Defendants further allege that in view of the judicial determinations in *Heaton v. Bristol*, supra, as alleged in Paragraph III of this answer, Plaintiffs and members of their class are not, as a matter of law, entitled to relief as prayed for in their Original Petition."

The Court overruled appellees' contention here expressed, to which they duly excepted, and the error is cross-assigned.

We have previously stated that the only evidence attempting to show that the named plaintiffs were members of an eligible class (independent of sex) to enroll as students in the college is stated in paragraph three of the agreed stipulations. There we find "All three women plaintiffs are graduates of accredited Texas High Schools." Mr. Heaton, Director of Admissions and Registrar at the college testified that graduation from an accredited high school was not the only requirement, independent of sex, permitting enrollment in the college. That statement is undenied and is not challenged.

#### [Procedural Ruled Quoted]

Subdivision (a) of Rule 42, T.R.C.P. provides:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is our view that persons bringing a class action under Rule 42 aforesaid, are required to be members of the class and be of sufficient number as will fairly insure representation of all, and such individuals cannot have interests which are antagonistic to the interest of absent parties whom they purport to represent. See McDonald, Texas Civil Practice, 1950 Ed., Sec. 3.34, p. 277; Moore's Federal Practice, 1948 Ed., Sec. 23.04, p. 3418, et seq. See also Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22.

In Yett v. Cook, 115 Tex. 205, 281 S.W. 837, 841, our Supreme Court made this statement:

" \* \* \* It is a rule of universal acceptance that to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject-matter in litigation, either in his own right or in a representative capacity \* \* \* "

#### *[Petitioner's Burden]*

As we understand the foregoing Rule we think the petitioners had the burden to introduce evidence in order to establish that they are members of a class eligible (independent of sex) to enroll as students in the college; otherwise they would not be persons constituting a class, and could not, therefore, represent unnamed plaintiffs who would be bound by issues in this case.

It is true that appellants here contend that the class they represent are graduates of accredited high schools; however, this view of appellants represents a view which is antagonistic to the interest of the absent parties to the litigation who seek to maintain a system of higher education in Texas affording a freedom of choice for themselves between an all-male institution of higher education, an all-female institution of higher education, and a co-educational institution of higher education. In other words, appellants here seek to change the public policy of this State as to its form of a higher educational system. So, again, we say that the appellants have wholly failed to carry their burden of showing that they are entitled to maintain their suit as a class action. Under the record here made we are of the view that the pertinent facts in the record of Heaton v. Bristol are substantially identical with the pertinent facts in the

instant case, and being of this view, we think it is our duty to overrule each of appellants' contentions.

Accordingly, the judgment of the trial court is affirmed.

#### ON MOTIONS FOR REHEARING

We have given our most careful attention to appellants' motion for rehearing, and after so doing we are of the view that it should be overruled, and it is accordingly overruled.

The appellees have filed their motion for rehearing in which they ask that the paragraph hereinafter quoted be stricken on the ground that the statement constitutes dictum not necessary to the decision or judgment of this Court. We quote such paragraph:

"Since Miss Allred has never made application to the proper authorities of A. & M. College for admission in order to pursue a course of study leading to a degree in floriculture; and since the A. & M. College authorities have not had an opportunity to pass on her application for this particular course (which the records show is obtainable only at A. & M. College in our system), we are compelled to take the action we have as it pertains to Miss Allred. But in view of the decision of our United States Supreme Court in Gaines v. Canada, supra, we feel it is our duty to say that in the event that Miss Allred makes application for admission to A. & M. College to pursue a course of study leading to a degree in floriculture, that she should be permitted to do so, and not be excluded solely on the ground that she is a member of the female sex. We further feel that in view of the Canada case, supra, and the foregoing, that should she so apply, and be otherwise qualified, the authorities of A. & M. College will grant her admission."

After carefully considering appellees' motion we are of the view that it should be granted, and that, the Clerk be directed to strike and delete the foregoing paragraph from the opinion handed down on May 19, 1960. Accordingly, appellees' motion to strike is granted, and the Clerk of this Court is directed to strike and delete the foregoing paragraph from such opinion.

**EDUCATION****Colleges and Universities—Texas****John Matthew SHIPP, Jr. v. Frank WHITE, et al.**

United States District Court, Northern District, Texas, Amarillo Division, March 1, 1960, Civil Action 2789.

**SUMMARY:** A Negro resident of Texas filed suit alleging that he had been denied admission to West Texas State College solely because of his race. After a hearing, plaintiff moved for a summary judgment on the basis of the material allegations in his pleadings not denied by defendants, and of the material facts admitted by defendants. The court issued an injunction requiring the college to admit plaintiff on the same basis as white citizens are admitted.

DOOLEY, District Judge.

**DECREE**

This Cause came on to be heard before the Honorable Joe B. Dooley, District Judge, this the 11th day of February, 1960, upon the verified complaint of the Plaintiff, John Matthew Shipp, Jr., Plaintiff's Motion for Summary Judgment, and the Answer of the Defendants, Frank E. White, Henry Sears, Florence Cotton, Elizabeth Koch, H. L. Mills, William V. Brown, C. S. Ramsey, Richard F. Stovall, James P. Cornette, Mrs. E. D. Lockey, Newton Gresham and West Texas State College; after hearing the argument of counsel and the entire record in this case having been considered by the Court, the Court finds that this Court has jurisdiction of the parties and the subject-matter of this controversy and the Court is of the opinion and finds that upon all of the material allegations in Plaintiff's pleadings not denied by the Defendants, plus all of the material facts admitted by the Defendants, Plaintiff's Motion for Summary Judgment ought be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiff's Motion for Summary Judgment be and the same is by the Court sustained.

IT IS DECLARED, ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiff, John Matthew Shipp, Jr. is entitled to enroll, study, and receive instruction at the Defendant, West Texas State Col-

lege on a racially non-discriminatory basis and upon the same terms and conditions that white citizens are permitted to enroll, study, and receive instruction at the Defendant, West Texas State College.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that a writ of injunction issue effective on and after the 31st day of May, 1960, permanently and perpetually enjoining the Defendant, West Texas State College, and the Defendants Frank White, Henry Sears, Florence Cotton, Elizabeth Koch, H. L. Mills, William V. Brown, C. S. Ramsey, Richard F. Stovall, James P. Cornette, Mrs. E. D. Lockey, and Newton Gresham, in their official capacity, as members of the Board of Regents of the West Texas State College, their agents, employees and their successors in office, and those acting in concert with the Defendants who shall receive notice of this Order, from denying, on account of race and color, the Plaintiff, John Matthew Shipp, Jr., the right and privilege of matriculating, attending, studying and receiving instruction at the Defendant, West Texas State College, or from using and enjoying the use of the educational facilities made available to white citizens attending the Defendant, West Texas State College.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that all costs incurred in this cause in this Court be, and the same are taxed against the Defendants herein, for which execution may be issued out of this Court.

## PRIVATE SCHOOLS Transportation—Connecticut

Francis H. SNYDER et al. v. TOWN OF NEWTOWN et al.

Supreme Court of Errors of Connecticut, May 31, 1960, 161 A.2d 770.

**SUMMARY:** Electors of Newtown, Connecticut, voted to use public funds to supply transportation for students attending a Roman Catholic parochial school. Other citizens of the township filed suit in a state superior court, contending that this action in effect required the taxpayers to support a religious group, and was forbidden by the federal and state constitutions. The court rejected this contention, holding the purpose was a public one, even though only a limited number of persons benefited, and that the action does not amount to governmental support of a church. However, the court held that the action was unlawful insofar as it purported to allocate certain funds specifically set aside by statute for the public schools. One judge dissented, contending that the entire action was unconstitutional.

Before BALDWIN, C.J., and KING, MURPHY, MELLITS, and SHEA J.J.

BALDWIN, Chief Justice.

This action for a declaratory judgment and injunctive relief was brought in September, 1958, and was reserved upon stipulated facts for the advice of this court. The plaintiffs challenge the constitutionality of what is now General Statutes § 10-281, concerning transportation for pupils in nonprofit private schools.<sup>1</sup> The statute,

1. "Sec. 10-281. TRANSPORTATION FOR PUPILS IN NON-PROFIT PRIVATE SCHOOLS. (a) Any town, city, borough or school district may provide, for its children attending private schools therein, not conducted for profit, when a majority of the children attending such school are from such municipality, any transportation services provided for its children attending public schools. Any such municipality which on October 1, 1957, was providing such services may continue to furnish the same until an official determination to the contrary is voted under the provisions of subsection (b) hereof. (b) The chief executive authority of any such municipality shall, upon petition of at least five per cent of the electors as determined by the last-completed registry list, submit the question of determining whether the services specified in subsection (a) may be so provided to a vote of the electors of such municipality at a special meeting called for such purpose within twenty-one days after the receipt of such petition. Such petition shall contain the street addresses of the signers and shall be submitted to the municipal clerk, who shall certify thereon the number of names of electors on such petition, which names are on the last-completed registry list. Each page of such petition shall contain a statement, signed under the penalties of perjury, by the person who circulated the same, that each person whose name appears on such page signed the same in person and that the circulator either knows each such signer or that the signer satisfactorily identified himself to the circulator. The warning for such meeting shall state that the purpose of such meeting is to vote on determining whether the services may be provided. Such vote shall be taken and the results thereof canvassed and declared in the same manner as is provided for the election of officers of

so far as the facts here are concerned, purports, in subsection (a) to empower a municipality to provide transportation for pupils attending a nonprofit private school as well as for those attending public school, if the majority of the children attending the private school are from the municipality. Any municipality which was providing such transportation on October 1, 1957, the date the act went into effect, may continue to do so until a vote taken pursuant to subsection (b) of the act determines otherwise. Subsection (b) provides that upon the petition of at least 5 per cent of the electors on the last completed registry list of the municipality, the question whether transportation shall be furnished to private school pupils shall be submitted to a special meeting of the electors and, if a majority approves, the transportation shall be furnished as of the beginning of the next fiscal period of the municipality.

The stipulation and the admitted allegations of the complaint disclose the following facts: The plaintiffs are electors, citizens and resident taxpayers of the town of Newtown, which in September, 1958, had a population of approxi-

such municipality, except that absentee voting shall not be permitted. The vote on such determination shall be taken by voting machine and the designation of the question on the voting machine ballot label shall be 'For transportation for children attending private schools, yes' and 'For transportation for children attending private schools, no' and such ballot label shall be provided for use in accordance with the provisions of section 9-250. If, upon the official determination of the result of such vote, it appears that the majority of all the votes so cast are in approval of such question, the provisions of subsection (a) shall take effect at the beginning of the next fiscal period of such municipality."



mately 9500 people and an area of approximately sixty square miles. Its fiscal year begins on October 1. Its total revenue for the year ending September 30, 1958, was approximately \$750,000. There were, on October 1, 1958, 1487 pupils in the public schools, including the high school. St. Rose's Roman Catholic Elementary School, a private parochial school, is not conducted for profit. It is under the control and supervision of the ministry of the Roman Catholic Church, and the pupils are instructed in Roman Catholic tenets and doctrines. The canons of the Roman Catholic Church provide, in substance, that Roman Catholic children shall be taught nothing contrary to the Catholic faith and good morals and that religious and moral training shall occupy the principal place in the school curriculum. In the elementary schools, the children must, in accordance with their age, be instructed in Christian doctrine, and the young people who attend the higher schools must receive a fuller religious training by priests conspicuous for their zeal and learning. Roman Catholic children are not allowed to attend nonCatholic schools except under circumstances and safeguards determined by the bishop of the diocese. St. Rose's School first opened on September 3, 1958, with 217 pupils, all from Newtown. As of June, 1959, there were four grades. The pupils are instructed by nuns. The school is accredited under the rules and regulations of the state board of education. See General Statutes §§ 10-4, 10-184, 10-188. Attendance at St. Rose's School satisfies the requirements of General Statutes § 10-184, which allows a child to attend a school other than a public school if he receives "equivalent instruction in the studies taught in the public schools," and § 10-188, which requires the teachers of private schools to keep registers of attendance and to make reports and returns similar to those received from the public schools. There is no other nonprofit private school in Newtown in which the majority of the children come from Newtown.

#### *[Busses Privately Owned]*

On October 1, 1958, 1413 pupils were being transported to the public schools in Newtown and 217 to St. Rose's School. The busses used were privately owned and were operated under a contract with the town board of education. The superintendent of schools established the routes. The regulations concerning transportation by school bus took into consideration the age of

the pupils and the distance between their homes and the schools they attended. The regulations obviously sought to avoid the hazards of highway traffic to pedestrians and to assist the children in getting to school in inclement weather. The routes proceed along heavily traveled state highways and state-aid and town roads where there are few sidewalks. They traverse sparsely settled rural areas as well as residential areas and business districts. The pupils attending the public schools and St. Rose's School share the same busses and have the same hours for school and the same school days. The cost of the transportation is paid from the general fund of the town, which includes moneys derived from property taxes, the school fund, and fees, licenses and permits. The furnishing of transportation to the pupils of St. Rose's School causes some additional expense to the town. The electors of Newtown had, on August 15, 1958, approved the supplying of this transportation, and it began on October 1, 1958.

In *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, the Supreme Court of the United States had before it a New Jersey statute which authorized district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for a profit. The boards provided reimbursement to parents for the fares paid to public carriers for transportation of children attending public and parochial schools. A divided court decided that the expenditure of tax-raised funds thus authorized was for a public purpose; that the statute did not violate the first amendment to the federal constitution, which prohibits any "law respecting an establishment of religion" and is made applicable to the states by the fourteenth amendment; and that the statute did not violate the due process and equal protection clauses of the fourteenth amendment. Whether the exclusion of children attending private schools operated for profit denied them the equal protection of the laws was not discussed, since the question was not raised and the record failed to show that there were any children in the district who attended, or would have attended but for the cost of transportation, any school other than public schools and Catholic schools. *Id.*, p. 4 n.2. The decision upheld a decision of the New Jersey Court of Errors and Appeals on the federal questions involved. *Everson v. Board of Education*, 133 N.J.L. 350, 44 A.2d 333.

The decisions of the Supreme Court of the United States on questions concerning the federal constitution are binding on the state courts. *Hemstead v. Reed*, 6 Conn. 480, 488; *Trustees of Bishop's Fund v. Rider*, 13 Conn. 87, 93; *State v. Palko*, 122 Conn. 529, 539, 191 A. 320; *Wojculewicz v. Cummings*, 143 Conn. 624, 629, 124 A.2d 886. Its decision in the *Everson* case, supra, disposes of the plaintiffs' claims under the federal constitution except in one respect, that is, that § 10-281, because it provides for the furnishing of transportation for children attending nonprofit private schools but not for children attending private schools conducted for profit, denies the latter the equal protection of the laws and discriminates against them. U.S. Const. Amend. XIV § 1. Whether § 10-281 is unconstitutional in that respect we are not now called upon to decide. It does not appear that any of the plaintiffs are persons who are being denied transportation because they are attending, or propose to attend, a private school conducted for profit. Since the plaintiffs are not members of the class which is claimed to be discriminated against, they cannot challenge the constitutionality of the statute on the ground in question. *McAdams v. Barbieri*, 143 Conn. 405, 411, 123 A.2d 182; *Carroll v. Socony-Vacuum Oil Co.*, 136 Conn. 49, 59, 68 A.2d 299; 11 Am. Jur. 759, § 114.

#### [Constitutional Arguments]

The plaintiffs claim that § 10-281 violates article first, §§ 1 and 12, of the Connecticut constitution in that § 10-281 discriminates against those attending private schools conducted for profit and provides for the use of public funds for a private purpose. The equal protection and due process clauses of the federal constitution and the corresponding provisions of §§ 1 and 12 of article first of our state constitution have substantially the same meaning. *Karen v. East Had-dam*, 146 Conn. 720, 726, 155 A.2d 921; *New Haven Metal & Heating Supply Co. v. Danaher*, 128 Conn. 213, 219, 21 A.2d 383; *State ex rel. Brush v. Sixth Taxing District*, 104 Conn. 192, 195, 132 A. 561. The plaintiffs are in no better position to raise the claim of discrimination under the state constitution than they are to raise it under the federal constitution. As regards their second point, it is true that a tax may not be imposed to provide funds to carry out a private, as distinguished from a public, purpose. *Beach v. Bradstreet*, 85 Conn. 344, 348, 82 A. 1030;

*Lyman v. Adorno*, 133 Conn. 511, 515, 52 A.2d 702. But "[i]t is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Everson v. Board of Education*, 330 U.S. 1, 7, 67 S. Ct. 504, 91 L. Ed. 711; *Cochran v. Louisiana Board of Education*, 281 U.S. 370, 50 S. Ct. 335, 74 L. Ed. 913; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U.S. 79, 87, 23 S. Ct. 26, 52 L. Ed. 111; *Forman Schools, Inc. v. Litchfield*, 134 Conn. 1, 9, 54 A.2d 710; see *Baker v. West Hartford*, 89 Conn. 394, 399, 94 A. 283; notes, 63 A.L.R. 413, 118 A.L.R. 806.

The "little red schoolhouse" maintained by a school district will ever have, for those who remember it, many happy associations. The present concept, however, is to bring pupils from far and near to a modern school building capable of housing all the grades necessary for a complete elementary or high school program. Distance, the frequent inclemency of the weather, and the hazards of automobile traffic make transportation of school children indispensable. It cannot be said that their transportation does not serve the purpose of education, and "[e]ducation in itself serves a public purpose." *Forman Schools, Inc. v. Litchfield*, supra, 9. It is clear, therefore, that the transportation of school children serves a public purpose, and the plaintiffs' argument on this point is untenable. A statute which serves a public purpose is not unconstitutional merely because it incidentally benefits a limited number of persons. *Amsel v. Brooks*, 141 Conn. 288, 297, 106 A.2d 152; *Barnes v. New Haven*, 140 Conn. 8, 14, 98 A.2d 523; *Warner v. Gabb*, 139 Conn. 310, 313, 93 A.2d 487; *State ex rel. Higgins v. Civil Service Commission*, 139 Conn. 102, 106, 90 A.2d 862; *Lyman v. Adorno*, 133 Conn. 511, 516, 52 A.2d 702.

#### [Compelling Support]

The plaintiffs place their main reliance for constitutional invalidity upon article seventh, § 1, of the constitution of Connecticut.<sup>2</sup> The

2. "[Conn. Const. Art. VII] Sec. 1. It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the Universe, and their right to render that worship, in the mode most consistent with the dictates of their consciences; no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association. But every person now belonging to such congregation, church, or religious association shall remain a member thereof until he shall have sep-

question is whether Newtown, by providing transportation for pupils of St. Rose's School, is compelling the plaintiffs, as well as other taxpayers in the town who are situated as the plaintiffs are, to support a parochial school and, by doing so, to support the Roman Catholic Church.

A very brief resume of the history behind article seventh, § 1, of our constitution, which was adopted in 1818, is helpful to an understanding of the meaning and intent of the language used. The preamble to the Fundamental Orders, Connecticut's, and the world's, first written constitution creating a government, states, after reciting the need for "an orderly and decent Government established according to God," that the founders, that is, the inhabitants of Windsor, Hartford and Wethersfield, do "associate and conjoin . . . to be as one Public State or Commonwealth; and do . . . enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus which we now profess, as also the discipline of the Churches, which according to the truth of the said Gospel is now practiced amongst us; as also in our civil affairs to be guided and governed according to such Laws . . . as shall be . . . decreed" in the manner provided in the subsequent orders. The founders were a homogeneous people belonging, for the most part, to what was to them the one and only church. Guardianship of that church was a basic policy with them, and they regarded the state as the secular arm of the church. See 1 Col. Rec. 2, 21, 524, 525; Cobb, *The Rise of Religious Liberty in America*, p. 242; Coons, *The Achievement of Religious Liberty in Connecticut*, p. 3 (Conn. Tercentenary Comm., Com. on Hist. Pub., Pamph. No. 60). While the church and state were bound closely together, the privilege of a freeman was never conditioned upon church membership. Cobb, op. cit., p. 245. Ecclesiastical societies, however, were organized by the general court, that is, the legislative body; churches were erected at public expense; the minister was called by a town meeting; and the

regular support of the church was raised by a tax on all. Id., 246; Greene, *The Development of Religious Liberty in Connecticut*, p. 58.

#### [Further Concessions]

In 1689, the general court gave to dissenters from the approved Congregational churches "allowance of their perswasion and profession in church wayes or assemblies without disturbance"; 2 Col. Rec. 109; but they were still taxed to support the approved churches. Coons, op. cit., p. 11; Cobb, op. cit., pp. 255, 264. Connecticut witnessed no such persecutions as occurred in other colonies. As tolerance gradually increased, further concessions were made to dissenters; these had the effect of enabling dissenters to pay for the support of the churches of their choice rather than the approved churches. Acts & Laws, 1769, pp. 169-171 (acts of May 11, 1727; May 8, 1729; Oct. 9, 1729); Statutes, 1784, pp. 21, 22; Cobb, op. cit., p. 501; Coons, op. cit., p. 22. Down to the time of the adoption of article seventh of the constitution of 1818, however, there was still a very large measure of authority in the general court over church affairs, with power to compel support of the church and attendance at services. The purpose of article seventh, and it finds its counterpart in the federal constitution and other state constitutions, was, in the words of Jefferson, to erect "a wall of separation between Church and State." 16 Writings of Thomas Jefferson 282; see *Everson v. Board of Education*, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711; *Reynolds v. United States*, 98 U.S. 145, 164, 25 L. Ed. 244; *Jewett v. Thames Bank*, 16 Conn. 511, 516; *Second Ecclesiastical Society v. First Ecclesiastical Society*, 23 Conn. 255, 274; Cobb, op. cit., pp. 248, 270, 501, 512, 513.

Let us turn now to the history of tax exemption in this state, because it throws light upon the meaning and intent of article seventh. Lands granted for the ministry of the gospel were exempted as early as 1684. 3 Col. Rec. 158; Statutes, 1702, p. 64. The exemption of church property continued during the following century and was in effect when the constitution was adopted by a convention in September, 1818, and ratified by the people in October, 1818. Statutes, 1784, p. 111; id., 1796, p. 252; id., 1808, p. 433. At the session of the General Assembly the following May, another law was passed exempting church property from taxation. Public Acts 1819, c. 2, § 14. The Revision of 1821 listed

arated himself therefrom, in the manner hereinafter provided. And each and every society or denomination of Christians in this state, shall have and enjoy the same and equal powers, rights and privileges; and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship, by a tax on the members of any such society only, to be laid by a major vote of the legal voters assembled at any society meeting, warned and held according to law, or in any other manner."

property which was subject to taxation; it did not specifically list church property nor specifically exempt it. Statutes, 1821, p. 444. It did, however, exempt ministers of the gospel from the poll tax, and their houses, lands or other taxable property to the amount of \$2500 from the property tax. Statutes, 1821, pp. 448, 449. In 1822, the General Assembly repaired the omission in the Revision of 1821 and specifically exempted buildings occupied as "colleges, academies, school houses, churches or infirmaries." Public Acts 1822, c. 29. This provision appears in the compilation of 1835. Statutes, 1835, p. 528; see *Masonic Building Assn. v. Stamford*, 119 Conn. 53, 57, 174 A. 301; *Yale University v. New Haven*, 71 Conn. 316, 333, 42 A. 87. Exemption of church property has been continued by the legislature in every compilation or revision of the general statutes since then to the present time. Statutes, 1838, p. 602; id., 1849, p. 603, § 11; id., 1854, p. 838, § 6; Rev. 1866, p. 707, § 6; Rev. 1875, p. 154, § 12; Rev. 1888, § 3820; Rev. 1902, § 2315; Rev. 1918, § 1160; Rev. 1930, § 1163; Rev. 1949, § 1761; Rev. 1958, § 12-81. A practical construction placed upon a constitutional provision immediately after its adoption and consistently and repeatedly followed by the legislature for over a century thereafter is most persuasive. *Cahill v. Leopold*, 141 Conn. 1, 14, 103 A.2d 818; *Water Commissioners v. Curtis*, 87 Conn. 506, 511, 89 A. 189. The continued legislative exemption of church property from taxation is strong evidence of the meaning of the constitutional prohibition against compulsory support of a church.

#### [Effect of Tax Exemption]

Exemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. *Lyman v. Adorno*, 133 Conn. 511, 516, 52 A.2d 702. The owners of tax-exempt property in the community derive the same benefits from government as other property owners but pay no property taxes for those benefits. This is true whether the relief from taxation be considered an exemption, as the legislature has described it, or results from a policy of considering church property not ratable for tax purposes. We conclude that the word "support" in article seventh was never intended to be employed in so narrow a sense as to prevent every

sort of incidental public assistance to, and encouragement of, religious activity.

With this background, we consider whether the use of tax-derived public funds to provide transportation for children to a school maintained by a church constitutes support of that church. To place the problem in proper focus, it is well to take note of the historic position of the state toward education. Our system of public schools had an early origin. Statutes, 1672, p. 62; 2 Col. Rec. 176. The purpose of the early as well as the later legislation was to provide at public expense schools for all, and particularly for those who could not otherwise obtain schooling. See General Statutes § 10-15. Education in this state was made compulsory long ago. Statutes, 1672, p. 13; General Statutes § 10-184. Parents or those who have charge of a child of school age are under a duty, enforceable by law, to send that child to public school unless he "is elsewhere receiving equivalent instruction . . . in the studies taught in the public schools." General Statutes § 10-184; see Public Acts 1842, c. 28; Statutes, 1849, p. 278, § 5. The state can compel school attendance, but it cannot compel public school attendance for those who choose to seek, and can find, the equivalent elsewhere. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070; *Judd v. Board of Education*, 278 N.Y. 200, 211, 15 N.E.2d 576.

The constitutionality of legislation authorizing transportation, at public expense, for children attending parochial schools has been upheld in states where the constitutional provisions invoked in opposition are couched in language stronger and more precise than that contained in article seventh. *Bowker v. Baker*, 73 Cal. App. 2d 653, 658, 167 P.2d 256; *Nichols v. Henry*, 301 Ky. 434, 438, 191 S.W.2d 930; *Board of Education v. Wheat*, 174 Md. 314, 323, 199 A. 628; *Adams v. County Commissioners*, 180 Md. 550, 556, 26 A.2d 377; see *Chance v. Mississippi Textbook Rating & Purchasing Board*, 190 Miss. 453, 468, 200 So. 706; *Cochran v. Louisiana Board of Education*, 281 U.S. 370, 375, 50 S. Ct. 335, 74 L. Ed. 913. The reasoning in these cases is substantially that advanced in the *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, that is, that public transportation to private schools aids the parents, who are under the compulsion of law to send their children to school; that it is a measure to promote the safety of the children; and that therefore it helps the parent and the children and not the school. A passage



in *Chance v. Mississippi Textbook Rating & Purchasing Board*, supra, 467, which concerns free schoolbooks for pupils in all elementary schools, states the argument in this fashion: "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all." The plaintiffs have cited cases from other states which hold that legislation providing for the transportation of children to parochial schools at public expense is unconstitutional; most of them are distinguishable on the peculiar language of the constitutional provision concerned or on their facts.

[Broad Discretion]

Section 10-281 gives a broad discretion to the town. It accords to the people of the town the power to decide whether to furnish transportation for pupils attending nonprofit private schools and to the board of education the duty of implementing any decision to provide such transportation. The people of the town can revoke their decision if they find the burden too great or the operation improperly handled. The statute is a legislative exercise of the police power of the state. Police power generally means the power to govern and belongs to every sovereignty. *Allyn's Anneal*, 81 Conn. 534, 538, 71 A. 794; *State v. Coleman*, 96 Conn. 190, 192, 113 A. 385; see *State v. Gordon*, 143 Conn. 698, 702, 125 A.2d 477; 2 Cooley, *Constitutional Limitations* (8th Ed.) p. 1223. It can be lawfully exercised only in the public interest. Constitutions do not describe it. They circumscribe it so that it cannot be used in contravention of private rights guaranteed by the constitution. Collisions between the exercise of the police power and constitutional limitations or prohibitions are frequent. They occur when government in the furtherance of a claimed public purpose meets the individual citizen asserting an alleged constitutional right. And so in this case, the legislature, thinking

to serve the welfare of parents and school children as well as that of the public, made provision for transportation to school at public expense. Private citizens claim, as they have the right to do, a violation of article seventh of the state constitution, proscribing any law to compel a person "to join or support" any church or religious association.

"The limit of the exercise of the police power is necessarily flexible, because it has to be considered in the light of the times and the prevailing conditions." *State v. Gordon*, supra, 703; *State v. Hillman*, 110 Conn. 92, 105, 147 A. 294. When a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear. *Edwards v. Hartford*, 145 Conn. 141, 145, 139 A.2d 599; *Schwartz v. Kelly*, 140 Conn. 176, 179, 99 A.2d 89; *State v. Muolo*, 119 Conn. 323, 325, 176 A. 401. 1 Cooley, op. cit., p. 371; 11 Am. Jur. 776, § 128. "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained." *Holmes, J.*, in *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U.S. 79, 88, 28 S. Ct. 26, 52 L. Ed. 111.

Article seventh, like the establishment of religion clause in the first amendment to the federal constitution, inter alia means that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa." *Everson v. Board of Education*, 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210, 68 S. Ct. 461, 92 L. Ed. 649; see General Statutes § 10-34. The statute challenged in the case at bar does none of these things. It aids the parents in send-

ing their children to a school of their choice, as is their right. It protects the children from the dangers of modern traffic and reduces the hazard of contracting illness in bad weather. It is consistent with the present-day policy of gathering children into modern schools for better educational opportunities. It primarily serves the public health, safety and welfare and fosters education. In the light of our history and policy, it cannot be said to compel support of any church. It therefore does not come within the proscription of article seventh. It comes up to, but does not breach, the "wall of separation" between church and state.

### [Role of School Fund]

The plaintiffs claim, also, that § 10-281 violates § 2 of article eight of the Connecticut constitution.<sup>3</sup> This article provides that the "school fund" shall remain a perpetual fund and that the interest from it shall be "inviolably appropriated to the support and encouragement of the public, or common schools throughout the state, and for the equal benefit of all the people thereof." The fund, originally \$1,200,000, derived from the sale of lands in the western reserve claimed by Connecticut. Statutes, 1821, p. 397 n. A statute enacted in 1795 imposed limitations on the use of the interest from the fund. Acts & Laws, 1795 (May Sess.); Statutes, 1796, p. 31; id., 1808, p. 43. The language of article eighth, § 2, of the 1818 constitution is sufficiently similar to that contained in the statute to show that the framers of the constitution were familiar with the statute.

In 1836, a surplus in the federal treasury was apportioned to the states. 5 Stat. 55, § 13. Connecticut's share, \$763,661.38, was parceled out by the General Assembly to the towns in the state on condition that at least one-half of the interest from it be appropriated "for the promotion of education in the common schools."

3. "[Conn. Const. Art. VIII] Sec. 2. The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public, or common schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall, as soon as practicable, be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made, authorizing said fund to be diverted to any other use than the encouragement and support of public, or common schools, among the several school societies, as justice and equity shall require."

Public Acts 1836, c. 71, § 4; Statutes, 1838, p. 472, § 4; id., 1854, p. 688, § 9; Conn. Bd. of Educ. Rep., pp. 134, 136 (1888). In 1855, a change was made whereby all the interests from this fund, known as the town deposit fund, was to be appropriated for the support of common schools. Public Acts 1855, c. 84, p. 105; see Rev. 1866, p. 347, § 117; Public Acts 1872, c. 77, § 108; Rev. 1875, p. 89, § 3; General Statutes § 7-353.

The moneys from the school fund and the town deposit fund can be used only for common or public schools because of, as to the school fund, article eighth, § 2, of the constitution and, as to the town deposit fund, the legislative mandate. General Statutes §§ 7-350, 7-353, 10-257. By specific legislative direction, the town deposit fund must be kept and accounted for as a separate fund. General Statutes, c. 107. It has nothing to do with the school fund and is not governed by article eighth, § 2, of the constitution. So far as § 10-281 purports to make available, for the transportation of pupils attending nonprofit private schools, the moneys derived from the school fund, the statute is unconstitutional. As to the moneys derived from the town deposit fund, the statute is inoperative by virtue of other legislation.

We were asked whether § 10-281 was unconstitutional for any of the reasons set forth in the complaint. To the question propounded, we answer "No, except as to moneys derived from the school fund; as to these, Yes, because of the provisions of article eighth, § 2, of the state constitution."

In this opinion KING, MURPHY and SHEA, Js., concurred.

### Dissent

MELLITZ, J. (dissenting in part) I concur in the portion of the opinion which discusses the school fund and answers the question propounded "Yes." I disagree to the extent that the opinion answers the question "No," and with the reasoning which leads to that conclusion.

The single issue involved in this aspect of the case is whether Newtown, in paying from public funds other than the school fund for transportation for children attending St. Rose's School, is acting in contravention of article seventh, § 1, of the constitution of this state. The pertinent portion of the constitutional provision is that "no person shall by law be com-

pelled to join or support, nor be classed with, or associated to, any congregation, church or religious association." The issue is one solely of interpretation of this specific constitutional provision. The majority opinion recites the stipulated facts. St. Rose's School is under the control and supervision of the ministry of the Roman Catholic Church. The school opened on September 3, 1958, with 217 pupils, all from Newtown. All of these pupils were transported to and from the school in busses operated at town expense.

The question of the constitutionality of the statute resolves itself to this: Does the payment by the town for the transportation of pupils to or from St. Rose's School constitute support of the school within the proscription of article seventh, § 1? The following from *Judd v. Board of Education*, 278 N.Y. 200, 211, 212, 15 N.E.2d 576, is typical of the statements found in cases which have had occasion to discuss the subject: "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance . . . Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (*State ex rel. Traub v. Brown*, 36 Del. 181, 187 . . .). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid . . . If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, . . . it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school."

#### [Form of Support]

The position of the majority is that the transportation is in furtherance of the state's compulsory education policy and that § 10-281 represents the legislative concern for the welfare and safety of children who must use the highways in attending school in accordance with the require-

ments of the law. The view is that since the expenditure serves to further the public welfare, it is a form of support which does not offend the proscription of the constitutional provision. The majority opinion does not question that where transportation is required to enable a child to attend school, it is an integral part of the operation of the school, and that payment of the expense of transportation is an expenditure in support of the school. The opinion professes to draw a distinction between a form of support which is proscribed and a form which is constitutionally permissible. In my view all compulsory support is proscribed, and the only questions to be resolved are whether the expenditure involved constitutes "support" and, if it does, whether the beneficiary of the support is a "congregation, church or religious association" within the meaning of article seventh, § 1, of the constitution. Here, the existence of both elements is established.

The opinion refers to a number of decisions in state courts where the constitutional validity of legislation such as that which is under consideration has been sustained. In most of the state courts where the question has been presented, the legislation has been held to violate state constitutional restrictions. *State ex rel. Traub v. Brown*, 36 Del. 181, 187, 172 A. 835; *Judd v. Board of Education*, 278 N.Y. 200, 211, 15 N.E.2d 576; *Mitchell v. Consolidated School District*, 17 Wash. 2d 61, 65, 135 P.2d 79; *Gurney v. Ferguson*, 190 Okla. 254, 255, 122 P.2d 1002, cert. denied, 317 U.S. 588, 63 S. Ct. 34, 87 L. Ed. 481, rehearing denied, 317 U.S. 707, 63 S. Ct. 153, 87 L. Ed. 564; *Visser v. Nooksack Valley School District*, 33 Wash. 2d 699, 708, 207 P.2d 198; *McVey v. Hawkins*, 364 Mo. 44, 55, 258 S.W.2d 927. The New York ruling was followed in 1938 by an amendment to the state constitution empowering the legislature to provide for the transportation of children to and from any school. N.Y. Const. Art. XI § 4. In New Jersey, a constitution was adopted in 1947 containing a similar provision. N.J. Const. Art. VIII § 4 (3).

The question we have is purely one of interpretation of a provision written into our constitution and of upholding it as it is written. The law leaves to every man the right to entertain such religious views as appeal to his individual conscience and to provide for his own children religious instruction and training to the extent and in the manner he deems essential or desirable. When he chooses to seek for them edu-

cational facilities which combine secular and religious instruction, he is faced with the necessity of assuming the financial burden which that choice entails. The observation of Justice Rutledge in his dissent in *Everson v. Board of Education*, 330 U.S. 1, 58, 67 S. Ct. 504, 91 L. Ed. 711, is apposite in this connection: "No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand."

[Tax Argument Irrelevant]

The discussion in the majority opinion of the exemption of the property of religious organizations from taxation is, in my view, not relevant to the question before us. In recognition of the importance of religion to the public welfare, it has been the firmly settled policy of the state since colonial days to leave such property, as property sequestered to public uses, untaxed. We have consistently recognized that the statutes do not

grant an exemption in the technical sense but merely state a rule of nontaxability. *Arnold College v. Milford*, 144 Conn. 206, 210, 128 A.2d 537; *Brunswick School v. Greenwich*, 88 Conn. 241, 243, 245, 90 A. 801; *St. Bridget Convent Corporation v. Milford*, 87 Conn. 474, 478, 88 A. 881. This policy has been in pursuance of the "principle that property necessary for the operation of State and municipal governments, and buildings occupied for those essential supports of government, public education and public worship, ought not to be the subject of taxation, [a principle which] has been with us accepted as axiomatic." *Yale University v. New Haven*, 71 Conn. 316, 332, 42 A. 87. The exemption takes nothing from the funds which have been raised by taxation and is not the same thing as compelling contribution to churches to the extent of the exemption. *Cobb, The Rise of Religious Liberty in America*, p. 523. As was said in *Trustees of Griswold College v. State*, 46 Iowa 275, 282, a constitutional prohibition against the levying of taxes or other rates for church purposes does not embrace a prohibition against exempting church property from taxation. See 2 Cooley, *Constitutional Limitations* (8th Ed.) p. 1089, n.2.

It is my view that the answer to the question propounded in the stipulation for reservation should be "Yes."

## CIVIL RIGHTS

### Airline Pilots—Fifth Amendment

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, et al. v. Elwood R. QUESADA.

United States District Court, Southern District, New York, March 14, 1960, 182 F.Supp. 595.

United States Court of Appeals, Second Circuit, April 21, 1960, 276 F.2d 892.

**SUMMARY:** The defendant, who is Administrator of the Federal Aviation Agency, issued an order forbidding the piloting of aircraft in carrier operations by persons over 60 years of age. Certain pilots and their bargaining union brought an action for a declaratory judgment and injunction against the enforcement of the regulation. Among the grounds on which relief was sought, the pilots contended that the regulation was arbitrary by being restricted to pilots of commercial aircraft, and violated their rights under the Fifth Amendment. The district court denied a preliminary injunction, holding that the Administrator's action was not arbitrary and was within the statutory direction to administer the Act in such a manner as "Will best tend to reduce or eliminate the possibility of, or recurrence, of accidents in air transportation." The Court of Appeals affirmed, finding that the Administrator had a reasonable basis for his exercise of judgment in setting the maximum age limit, and that he did not act unreasonably in placing stricter limitations on passenger plane pilots carrying many persons who have no opportunity to select their own pilot.



**CIVIL RIGHTS****Judicial Immunity—California****Elizabeth B. JOHNSON v. Charles B. MacCOY.**

United States Court of Appeals, Ninth Circuit, March 31, 1960, 278 F.2d 37.

**SUMMARY:** Plaintiff filed an action for damages under the Civil Rights Act against a municipal court judge who had issued felony complaints against her. Another municipal judge had ruled that defendant acted without authority. The federal district court dismissed the action. On appeal, the Court of Appeals for the Ninth Circuit held that, there being no showing from the evidence that the judge had acted in the clear absence of jurisdiction, he was protected by common law judicial immunity in regard to acts done in the exercise of his judicial functions.

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**CIVIL RIGHTS****Limitations—Federal Statutes****Bennie TRUITT v. STATE OF ILLINOIS.**

United States Court of Appeals, Seventh Circuit, June 1, 1960, 278 F.2d 819.

**SUMMARY:** A man brought suit in federal court against the State of Illinois, seeking \$790,000 damages, alleging that a state court judge had unlawfully convicted him of murder. In support thereof he asserted that he had been tried behind closed doors without assistance of counsel and convicted upon false and insufficient evidence. The suit was dismissed for lack of jurisdiction. The Court of Appeals for the Seventh Circuit affirmed, holding, inter alia, that the civil rights statutes do not create a cause of action for false imprisonment unless done pursuant to a systematic policy of discrimination against a class or group of persons, which was not alleged in this case.

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**CIVIL RIGHTS****Limitations—Federal Statutes****Marian Timmerman BYRD, by Harry Timmerman, Father and Natural Guardian, as Next Friend v. F. L. SEXTON et al.**

United States Court of Appeals, Eighth Circuit, March 28, 1960, 277 F.2d 418.

**SUMMARY:** A girl brought an action in federal district court under federal civil rights statutes, against officials of a Missouri school district, contending that pursuant to a conspiracy defendants had in their official capacities and under color of state laws acted maliciously and unlawfully to deprive her of the right to attend without charge a public school and to deprive her of liberty, equal protection under the laws, and privileges and immunities secured to her by the Fourteenth Amendment. It was alleged that such deprivations occurred when defendants excluded her from a free public high school for refusing to pay an enrollment

fee and, after she repeatedly attempted to attend classes, had her arrested and jailed on a charge of disturbing the peace, although the charge was later dismissed without prosecution. Assuming, without deciding, that under state law defendants lacked power to require a fee, the court nonetheless dismissed the action with prejudice, holding that in order to obtain relief under the civil rights act it would have to be shown additionally "that they were motivated to act thus by plaintiff's membership in some class or group of persons which the United States has determined to protect." The Court of Appeals for the Eighth Circuit affirmed, pointing out that, as the plaintiff does not attack the validity of the state constitutional provision for "free schools for . . . gratuitous instruction," but rather contends that defendants' acts thereunder are unlawful, the right asserted is not secured by the Fourteenth Amendment and affords no basis for a suit under the civil rights statutes. And it added that the *School Segregation Cases* do not prescribe "as a federal right the availability of education, let alone free education, through state facilities," but only that, where states provide it, it must be made available to all on equal terms. The court conceded that the civil rights statutes appear to be broad and inclusive in their language and directed to remedies for deprivation of "any right or privilege of a citizen of the United States," but noted numerous federal court decisions emphasizing the original purpose of those statutes to aid in the enforcement of the Civil War Amendments and called attention to the narrow interpretation lately accorded them in extensive litigation. The court said such decisions "outline a specific and narrow area of applicability of the statutes and one which the plaintiff's case does not reach." If plaintiff has a cause of action, the court observed, it is for invasion of personal rights for which state laws and forums provide the avenue of relief.

Before SANBORN, VAN OOSTERHOUT and BLACKMUN, Circuit Judges.

BLACKMUN, Circuit Judge.

This action, brought under 42 U.S.C.A. § 1983 and § 1985, concerns alleged civil rights violations committed in connection with the imposition of an \$8.00 annual high school "enrollment fee"<sup>1</sup> which plaintiff, as a pupil, refused to pay for the school year 1955-56. Jurisdiction is based on 28 U.S.C.A. § 1343.<sup>2</sup> The case was tried to the court without a jury and judgment was entered dismissing the action with prejudice.

The suit was instituted March 26, 1956. Plaintiff Marian Timmerman was then 17 years of age and unmarried.<sup>3</sup> She had completed her freshman and sophomore high school years at Hancock High School in Lemay, St. Louis County, Missouri, and, beginning some time in 1954, she and her parents took up residence on a rural route in Washington County, Missouri. Their home there was about 10 miles southeast of the City of Sullivan in the adjoining Missouri County of Franklin. Marian attended Sullivan High School as a junior during the school year 1954-55. This was under an arrangement, in effect for some years, between the school officials of the Washington County district and the Board of Education of Consolidated District No. 2, Franklin County, whereby students living in a

certain area (where plaintiff resided) of Washington County could attend high school in Sullivan rather than in Potosi, some 25 miles away.<sup>4</sup> Tuition and, beginning in September 1954, transportation costs were charged by the Consolidated District to the Washington County District and paid by the latter, and the Consolidated District in return provided the school facilities, instruction and bus transportation.

Defendant F. L. Sexton is the Superintendent of Schools of the Consolidated District. The other defendants involved in this appeal are the members of the Board of Education of the District.<sup>5</sup>

#### [Counts of Complaint]

The complaint has 2 counts. Count I is based upon § 1983.<sup>6</sup> It claims violation by defendants of plaintiff's federal rights "under color of" defendants' official authority.<sup>7</sup> Count II is based upon § 1985, presumably paragraph (3) there-

1. Footnotes 1 through 5 are omitted.

6. § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

7. Footnote omitted.

of,<sup>8</sup> and alleges the corresponding conspiracy.<sup>9</sup> Actual and punitive damages are asserted under both counts. The answers are general denials and they contain denials, also, that plaintiff can bring any action against the defendants under § 1983 or § 1985.

So far as the record discloses, no issue of race is in this case.

There is little dispute about the essential facts. We review them in detail here only in an attempt to reproduce the atmosphere prevailing at Sullivan in September, 1955. As stated above, Marian first attended Sullivan High School as a junior during the school year 1954-55. For that year the \$8.00 enrollment fee was charged to and apparently paid by all the high school's students, residents as well as non-residents and including Marian. This fee seemingly was a matter of some concern to Marian's father for during that school year he wrote letters to the Governor and others about the charge. He had also seen Sexton, and as early as September 9, 1954, Sexton had written Timmerman in response to a letter from him, that the fee included text books and work books used during the year, admission to 5 special assemblies, admission to all basketball games except the annual tournament, a copy of the monthly school paper, and admission to Junior and Senior class plays and the annual May Day Festival. The letter also said that if it were necessary for a student to purchase his own textbooks, they would cost more than the \$8.00 fee.

Marian's record during the 1954-55 school year was good.

On August 22, 1955, a form letter was mailed by Sexton to Marian at her home and received by her the following day. This contained enrollment information for the coming year and the requirements for graduation. It stated that the enrollment date for juniors and seniors was

Thursday, September 1st, and for others Friday the 2nd; that, however, buses were to operate only on Friday; that junior and senior bus students would be accepted on Friday, if they had no transportation Thursday; that school opened Tuesday, September 6th; and that the enrollment fee for the high school was \$8.00 and for the eighth grade was \$2.50. The same letter was sent to all students who had attended the school the year before and made no distinction, as far as the fee was concerned, between resident and non-resident students or among any of them.

On September 2 Marian went to school by the bus. She stood in line to make out her class schedule. The teacher there asked for her receipt for the enrollment fee. She said she had no receipt and was sent to Mr. Sexton. Sexton told her that she could not attend school without paying the fee. She asked for an itemized statement and said she was willing to pay for her books. Sexton said that the books would cost more than the enrollment fee and that she would have to pay the fee. Marian had the money with her and was fully able to pay. The payment, however, was not made.

On Tuesday, September 6th, the first day of school, Marian again took the bus. She talked with the principal and said that she wanted to know where her \$8.00 was going. She attended an assembly and then went to a class. She was sent from that class to Sexton's office. There she stated that this was a free public high school, that her home district had paid her tuition and bus fare and that she did not think she had to pay the enrollment fee. She then sat in Sexton's outer office the rest of the day. She rode the bus home.

The following day, September 7th, a bus did not stop for her and 2 other students. The 3 were taken to school by Marian's mother. Again she went to a class; she was told that she was trespassing but stayed in the class. After that she went to another class and was then sent to Sexton's office where she sat until lunch and during the afternoon. On that day Sexton told Marian that even if she paid the \$8.00 she could not come to that school. She went home by the bus.

#### [Exclusion from School]

That night Sexton called a special meeting of the Board of Education. The Board by formal and unanimous action determined that Marian "cannot be accepted as a student in the Sullivan

8. § 1985(3). "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

9. Footnote omitted.

High School for 1955-56" because she was not a resident of the district, because she "has refused to comply with the rules and regulations governing the school", and because she "has created a disturbance and interfered with the normal operation of the school and classroom work." A registered letter was sent by Sexton with the approval of the Board to Marian's parents on September 8th. This quoted the Board's minutes concerning that action. It also stated that "If Marian continues to appear on the campus or in the buildings it will be necessary to have her removed by an officer of the law." This apparently is the only communication, written or oral, between the Board or Sexton and Marian's parents. On Thursday and Friday, September 8th and 9th, Marian went back to school and sat in Sexton's office those two days without conversation with him.

On Monday, the 12th, she again went to the school by bus, attended a first hour class and a study hour and then was sent to Sexton's office where she sat. After lunch she went to a gymnasium class where she was not permitted to participate. She then went back to Sexton's office. Sexton felt that the situation "was having a certain effect on other students" and reported the matter to the Prosecuting Attorney. That afternoon the sheriff arrested Marian in Sexton's office for disturbance of the peace. He took her to his office in Union, Missouri. Marian attempted to reach her father by telephone from Union but was unable to do so at first. She was taken to Magistrate Court where an Information against her for disturbance of the peace was read. She pleaded not guilty. Bond was set at \$500. Marian was able finally to reach her father in late afternoon. No bond was posted and she remained in jail from late Monday afternoon until mid-morning Wednesday. Counsel for Marian was retained. He obtained a change of venue to Hermann, Gasconade County, Missouri. The case was dismissed there without prosecution and Marian was released.

There was publicity about these events and there are claims that this experience adversely affected Marian's disposition and nervous condition and thwarted her plans to enlist in the Women's Division of the Marine Corps.

Marian made no further attempt to attend school at Sullivan but went to Roosevelt High School in St. Louis for a few days and lived with her grandmother during that time. The officials there ascertained that her home was

with her parents in Washington County and she was not allowed to continue. She finished the year back at Hancock High School in Lemay and paid tuition there.

There is some conflict in the record as to Marian's conduct while she was sitting in Sexton's office. She apparently mingled with the students as classes were changed and kept notes of conversations between office personnel and those who called at the office. There is conflict, too, as to whether on September 12th Marian took a small overnight bag to school; she and her mother deny that such a bag was taken and Sexton himself did not see one, but the arresting sheriff said she had one in her possession. Marian acknowledged that she had been warned that if she continued to come to the school she would be arrested for disturbance of the peace.

#### [Use of Fee]

The fee in question went into the school district's incidental fund. Payments of expenses for the general operation of the school, other than teachers' salaries, were made from that fund. An enrollment fee had been charged in the Sullivan public school system for a number of years. It was in effect prior to the election of any of the defendant board members and prior to Sexton's appointment as superintendent. It had been raised during Sexton's administration from around \$6.50 to \$8.00 but it had been at \$8.00 for the 1954-55 school year. Sexton was unable to break the charge down among the various items for which it was said to be imposed. There was no formal requirement that students attend the assemblies, the games, the plays, or the festival, or receive or read the school paper, and failure to do these things did not deprive a pupil of his eligibility for graduation.

The trial court, in reaching its decision that the plaintiff had failed to establish a cause of action under either § 1983 or § 1985, assumed, without deciding, that, as a matter of Missouri law, the school officials had no power to require the plaintiff to pay the fee. The court felt, however, that, in order to obtain relief under the civil rights statutes, the plaintiff "must show more than that the actions of the school officials in excluding her from high school and causing her arrest were unlawful under Missouri law" and that she must show "that they were motivated to act thus by reason of plaintiff's membership in some class or group of persons which the United States has determined to protect."



The question whether the \$8.00 fee violates the "gratuitous instruction" mandate of Article IX, § 1(a),<sup>10</sup> of the Missouri Constitution, V.A.M.S., deserves mention initially. While we might entertain some doubts, under the record in this case, about the fee's Missouri constitutional invalidity<sup>11</sup> and about the adequacy of the proof of its discriminatory application, its invalidity under state law is not an answer to the question whether plaintiff's federal civil rights have been violated. *Mueller v. Powell*, 8 Cir., 203 F.2d 797, 800. We therefore follow the example of the trial court and assume, for purposes of this opinion only and without passing upon the question, that the defendants were without power to impose or to collect the fee.

#### [Eighth Circuit Precedents]

We might summarily regard this case as correctly decided below upon either of the following grounds:

1. That it is governed by this court's opinions handed down 18 years ago in *Love v. Chandler*, 124 F.2d 785<sup>12</sup> and in *Blood v. Pearson*, 124 F.2d 787. These were actions for damages

10. Section 1(a). "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law . . ."
11. The imposition of a fee for tuition and essential equipment has been held to be prohibited by the corresponding "gratuitous instruction" language in Article XI, § 1, of the predecessor Missouri Constitution of 1875 even in the presence of most unusual facts. *State ex rel. Roberts v. Wilson*, 221 Mo.App. 9, 297 S.W. 419. See also *Moore v. Brinson*, 170 Ga. 680, 154 S.E. 141. On the other hand the constitutional guaranty does not appear to be absolute, for it does not seem to be a bar to the collection, from his home district, of tuition for a non-resident pupil, under *Vernon's Annotated Missouri Statutes* § 165.253 or § 165.257, or from the pupil or his parent, as provided for by § 165.257, if the district fails to pay. *Linn Consolidated High School Dist. No. 1 v. Pointer's Creek Public School District*, 356 Mo. 798, 203 S.W.2d 721, 724, explaining *State ex rel. Burnett v. School District*, 335 Mo. 803, 74 S.W.2d 30. Furthermore, one might question whether the Sullivan enrollment fee was for "instruction", in whole or in part, or whether games, plays, the school paper and the like, are only incidental to instruction and are routine items, so long as they are kept within reasonable bounds, in American high school life.
12. Regarded as sufficiently in conflict with *Hardyman v. Collins*, 9 Cir., 183 F.2d 308, to warrant the granting of certiorari in that case, 340 U.S. 809, 71 S.Ct. 63, 95 L.Ed. 594. The *Hardyman* case was reversed by the Supreme Court, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253.

brought under what is now § 1985 and § 1986 of 42 U.S.C.A.<sup>13</sup> It was claimed that the defendants, most of whom were officers or agents of the United States or of the State of Minnesota, had conspired to prevent, and did prevent, the plaintiff from having and holding employment under the Works Progress Administration. This court said, at page 787 of 124 F.2d:

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. . . . The appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State."

The *Love* case has been cited with approval in at least two later opinions of this court. *Moffett v. Commerce Trust Co.*, 187 F.2d 242, 247; *Brewer v. Hoxie School District*, 238 F.2d 91, 104.<sup>14</sup>

#### [Snowden v. Hughes]

2. That it is governed by *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, decided 16 years ago. The plaintiff there brought his action, under the statutes now before us, for damages for alleged infringement of his civil rights. He claimed that the defendants, who were members of the Illinois State Primary Canvassing Board, in violation of state law, refused to file a certificate of plaintiff's nomination in the primary as one of 2 nominees of his party for the state legislature. The court held that the plaintiff's rights under the privileges and im-

13. In prior compilations, § 1983 is found as § 43 of former Title 8 U.S.C.A., and as R.S. § 1979, and § 1985(3) is found as § 47(3) of former Title 8 U.S.C.A., and as R.S. § 1980.
14. For other cases in this court touching upon § 1983 or § 1985, see *Mueller v. Powell*, 203 F.2d 797, supra; *Tate v. Arnold*, 223 F.2d 782; *Norwood v. Parenteau*, 228 F.2d 148, certiorari denied 351 U.S. 955, 76 S.Ct. 852, 100 L.Ed. 1478, and *Brooks v. School District*, 267 F.2d 733, certiorari denied 361 U.S. 894, 80 S.Ct. 196, 4 L.Ed.2d 151. *Culp v. United States*, 8 Cir., 131 F.2d 93, concerns the parallel criminal statute.

munities, due process, and equal protection clauses of the Fourteenth Amendment were not offended, and said, at pages 6, 7 and 8 of 321 U.S., at page 400 of 64 S.Ct.:

"The protection extended \* \* \* by the privileges and immunities clause \* \* \* does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law \* \* not every denial of a right conferred by state law involves a denial of the equal protection of the laws, \* \* the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

#### [Nature of the Claim]

In the present case the claim is not that the Missouri Constitution itself operates as a violation of plaintiff's federal civil rights (a not uncommon situation typified by the segregation cases referred to below) but, instead, it is that the defendants' acts are unlawful under the Missouri Constitution, the validity of which is not attacked. Therefore, as in *Snowden v. Hughes*, at page 13 of 321 U.S., at page 403 of 64 S.Ct., we might conclude that the right asserted by plaintiff "is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon \* \*."

Because, however, the Supreme Court, in the interval since the *Love* and *Snowden* cases were decided, has further considered the statutes, because the segregation cases, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, have been stressed by the parties, because this case touches upon the educational process, and because this court in *Brewer v. Hoxie School District*, 238 F.2d 91, 104, affirmed the granting of relief in a case in the field of education and cited § 1985 (3) "as affording additional support to the federal jurisdiction and the issuance of the injunction", we feel that another review of pertinent cases under

these statutes, particularly those of recent years, is indicated and might be helpful here.

#### [Begin with Segregation Cases]

We necessarily begin with the segregation cases. We recognize that the education of children is one of the fundamental and deep concerns of free men. And we are fully aware of the importance of education in the lives and opportunities of the youth of our nation. We heartily share with the Supreme Court its observation made, now some five and one-half years ago, in *Brown v. Board of Education*, supra, at page 493 of 347 U.S., at page 691 of 74 S.Ct.:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

We note also the reaffirmance of the *Brown* holding and the court's adherence to its stated policy in the later case of *Cooper v. Aaron*, 358 U.S. 1, 19-20, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5, 19, where it was said:

"It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under the law. The Fourteenth Amendment embodied and emphasized that ideal \* \* \* Since the first *Brown* opinion

three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under the law is thus made a living truth."

[*Limitations Implied by Brown*]

It is perhaps initially to be observed that the language quoted from *Brown* implies certain limitations. Neither that language nor the holding itself prescribes as a *federal* right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only "where the state has undertaken to provide it", the opportunity of an education "is a right which must be made available to all on equal terms."

We therefore look to § 1983 and § 1985 to ascertain whether they are sufficiently broad to embrace an action such as this. The answer to this question has never been an apparent or particularly easy one. The statutes at first reading appear to be broad and inclusive in their language and directed to remedies for the deprivation of "any rights, privileges or immunities secured by the Constitution and laws" or of "any right or privilege of a citizen of the United States." Nevertheless, after what we trust is a sufficiently exhaustive review of the decided cases, both in the Supreme Court and in the lower Federal courts, we conclude, as was done in the *Love*, *Blood* and *Snowden* cases, that these sections afford no relief for the plaintiff's alleged injuries here. We reach this result after consideration of the following:

[*History of the Statutes*]

A. The history of the statutes. These sections came into the present Code from the old Revised Statutes, § 1979 and § 1980, respectively, and those in turn had their origin in the early Civil Rights Acts, particularly the Act of April 20, 1871, 17 Stat. 13,<sup>15</sup> adopted soon after the

Civil War to implement the then recent Thirteenth, Fourteenth and Fifteenth Amendments. They were thus designed for a specific purpose. This history and this purpose have been noted and emphasized by the Supreme Court. *Hague v. C. I. O.*, 307 U.S. 496, 509-510, 59 S.Ct. 954, 83 L.Ed. 1423; *United States v. Williams*, 341 U.S. 70, 73 et seq., 88, 71 S.Ct. 581, 95 L.Ed. 758; *Collins v. Hardyman*, 341 U.S. 651-656, 71 S.Ct. 937, 95 L.Ed. 1253; *Stefanelli v. Minard*, 342 U.S. 117, 121, 72 S.Ct. 118, 96 L.Ed. 138; see Mr. Justice Roberts, dissenting, in *Screws v. United States*, 325 U.S. 91, 140 et seq., 65 S.Ct. 1031, 89 L.Ed. 1495, and by this court in *Love v. Chandler*, where it was said, at page 786 of 124 F.2d:

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. \* \* \* The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. \* \* \* The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States \* \* \* did not have the effect of taking into federal control the protection of private rights against invasion by individuals. \* \* \* The protection of such rights and redress for such wrongs was left with the States. \* \* \*" (Citations omitted.)

Inasmuch as the statutes were designed for a particular purpose, one might reasonably expect that, when the tension of those difficult times had somewhat relaxed, the use of the statutes would lessen. That, until recent years at least, seems to have been a fact. The 1st Circuit has noted this in *Francis v. Lyman*, 216 F.2d 583, 586, in speaking of § 1983:

"As is well known, the statute in question was originally enacted by the Congress in

15. See also the Act of April 9, 1866, 14 Stat. 27, the Act of March 2, 1867, 14 Stat. 484, and the Act of May 31, 1870, 16 Stat. 140.

the turbulent days of Reconstruction. For many years the enactment remained on the books, in a somewhat dormant state; and the Congress has never taken occasion to revise or modify the statutory language substantially. It may be that this is to be explained by the fact that until recent years resourceful plaintiffs' lawyers have not sought, in a significant number of cases, to invoke the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress in 1871 when they first enacted the legislation. At any rate, the Congress has sub silentio retained the act in effect, as it now appears, without substantial change, in 42 U.S.C.A. § 1983."

So, also, has the Supreme Court, *Collins v. Hardyman*, supra, at page 656 of 341 U.S., at page 939 of 71 S.Ct.; and see Mr. Justice Jackson's dissenting remark in *Cassell v. State of Texas*, 339 U.S. 282, 303, 70 S.Ct. 629, 639, 94 L.Ed. 839.

We are impressed here with the particular history and origin of these sections, with their specific original purpose and with their dormancy until recent years. All these are narrowing considerations and, in the light of the other factors hereinbelow discussed, we regard them as significant.

#### [*Atmosphere Under Which Enacted*]

B. The atmosphere under which the statutes were enacted. The 1st Circuit in *Francis v. Lyman*, supra, at page 586 of 216 F.2d, described that time as "the turbulent days of Reconstruction." The Supreme Court, after detailed study of the Congressional records, said in *United States v. Williams*, supra, at page 74 of 341 U.S., at page 583 of 71 S.Ct., with respect to the parallel criminal sections:

"The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by

different sponsors and hastily adopted. They received little attention in debate. \* \* \*

and, with respect to § 1985, in *Collins v. Hardyman*, at pages 656-657 of 341 U.S., at page 939 of 71 S.Ct.:

"This statutory provision has long been dormant. \* \* \* The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War. \* \* \* The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."

and, in *Stefanelli v. Minard*, supra, at page 121 of 342 U.S., at page 120 of 72 S.Ct.:

"These considerations have informed our construction of the Civil Rights Act. This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning."

See, also, Mr. Justice Roberts, dissenting, in *Screws v. United States*, supra, at page 140 of 325 U.S., at page 1054 of 65 S.Ct.

It would seem logically to follow that statutes formulated in troubled times and enacted in haste are to be interpreted broadly only with caution.

#### [*Statute's Limited Recognition*]

C. The statute's limited recognition in the courts. In spite of their long dormant state, § 1983 and § 1985 lately have been the subject of extensive litigation. All the cases, perhaps, cannot be reconciled and there have been strong and frequent dissents. A close examination of the cases, however, discloses that in practice the statutes have received a narrow interpretation.

1. In the United States Supreme Court. Although the Supreme Court has made passing references to these sections as providing relief



in appropriate situations,<sup>16</sup> and in fact has used them as a basis for granting equitable relief,<sup>17</sup> the instances of Supreme Court approval of damage actions brought under these statutes have been comparatively few indeed, and appear to be restricted to situations involving deprivation of the right to vote because of race.<sup>18</sup> On the other hand, actions under the civil rights statutes have not been fruitful in a number of varying circumstances. These include not only situations where perhaps one of the influencing factors was the absence of state authority,<sup>19</sup> but, as well, situations where color of state law or state authority was alleged or was apparent.<sup>20</sup>

16. *Ray v. Blair*, 343 U.S. 214-227, 72 S.Ct. 654, 96 L.Ed. 894; *O'Sullivan v. Felix*, 233 U.S. 318, 323, 34 S.Ct. 596, 58 L.Ed. 980; see Mr. Justice Frankfurter's dissenting remarks in *Burns v. State of Ohio*, 360 U.S. 252, 262, 79 S.Ct. 1164, 1171, 3 L.Ed.2d 1209.
17. *Hague v. C.I.O.*, 307 U.S. 496, 53 S.Ct. 954, 83 L.Ed. 1423; *Brown v. Board of Education*, supra; *Bolling v. Sharpe*, supra; *United States v. Raines*, 80 S.Ct. 519.
18. *Myers v. Anderson*, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349; *Nixon v. Herndon*, 273 U.S. 533, 47 S.Ct. 446, 71 L.Ed. 759; *Nixon v. Condon*, 236 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984; *Lane v. Wilson*, 307 U.S. 208, 59 S.Ct. 872, 83 L.Ed. 1281; *Smith v. Allwright*, 321 U.S. 643, 64 S.Ct. 757, 88 L.Ed. 987, overruling *Crovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292; and see *Giles v. Harris*, 189 U.S. 475, 485, 23 S.Ct. 639, 47 L.Ed. 909.
19. *Bowman v. Chicago & Northwestern Railway Co.*, 115 U.S. 611, 6 S.Ct. 192, 29 L.Ed. 502 (refusal of defendant to carry beer into Iowa because of a prohibitory Iowa Statute); *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (suit to restrain violation of agreement among property owners not to convey property to a negro); *Collins v. Hardyman*, supra (damage action for the breaking up of a public meeting).
20. *Carter v. Greenhow*, 114 U.S. 317, 330, 5 S.Ct. 928, 962, 29 L.Ed. 202, 207 (damage action for refusal of defendant tax collector to accept in payment of taxes coupons tendered under an alleged contract with the State); *Pleasant v. Greenhow*, 114 U.S. 323, 330, 5 S.Ct. 931, 962, 29 L.Ed. 204, 207 (same); *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374 (suit to enjoin collection of taxes claimed to rest on patent rights); *Moyer v. Peabody*, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410 (damage action against a Governor and others for imprisonment during alleged insurrection); *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (suit by members of Jehovah's Witnesses to restrain threatened criminal prosecution in state courts for violation of a city ordinance prohibiting solicitation without first procuring a license); *Snowden v. Hughes*, supra, (damage action for failure to certify plaintiff as a successful primary nominee); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (damage action with respect to investigation by a committee of the California legislature);

Furthermore, even where the Court felt that the complaint established a case within the adjudicatory power of the federal courts under the statutes, or assumed that it did, it has been cautious in granting relief where to do so would interfere with state court proceedings (saving an exception where there is a "call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent"), *Douglas v. City of Jeannette*, supra, at page 163 of 319 U.S., at page 881 of 63 S.Ct., or where "the proper balance between the States and the federal government in law enforcement" would be affected, see *Screws v. United States*, 325 U.S. 91, 108, 65 S.Ct. 1031, 1039, 89 L.Ed. 1495, and *Stefanelli v. Minard*, supra, at page 121 of 342 U.S., at page 120 of 72 S.Ct., or until every chance has been given the state courts first to construe the challenged state statutes, *Harrison v. N. A. A. C. P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152. These contingencies are perhaps illustrated by Mr. Justice Frankfurter's comment, concurring in *Snowden v. Hughes*, supra, at page 16 of 321 U.S., at page 405 of 64 S.Ct.:

"Our question is not whether a remedy is available for such illegality, but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts to the states, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials."

The criminal law counterparts of § 1983 and § 1985, namely, 18 U.S.C. § 241 and § 242, and their respective predecessor statutes and other related laws, have encountered similar limitations in the cases. These hotly contested sections have generally been held available by the court to support prosecutions of conduct which interferes with rights that flow "from substantive powers of the Federal govern-

*Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (action for injunction against the use in a state criminal proceeding of evidence claimed to have been obtained by an unlawful search by state police); and see *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (action for declaratory judgment as to alleged unconstitutionality of state statutes, with jurisdiction retained until the state courts were given a reasonable opportunity to construe the statutes).

ment."<sup>21</sup> At the same time, the criminal statutes have been held to afford no room for prosecution of individuals for alleged violations of "rights which the Constitution merely guarantees from interference by a State."<sup>22</sup>

It seems to us, from all this, that the Supreme Court in its decided cases entertains a dim view toward expanding the interpretation and scope of the statutes in question, that it has construed

them narrowly in the light of their initial purpose, and that there is little precedent for the plaintiff's action here. This lack of affection for the statutes has been noted by Mr. Justice Douglas, dissenting in *Martin v. Creasy*, 360 U.S. 219, 228, 79 S.Ct. 1034, 3 L.Ed.2d 1186, and, more specifically, in *Irvine v. People of State of California*, 347 U.S. 128, 152, 74 S.Ct. 381, 393, 98 L.Ed. 561, where he says, by way of footnote:

"The current hostility towards federal actions—both criminal and civil—under the civil rights laws is further evidenced by *United States v. Williams*, 341 U.S. 70 [71 S.Ct. 581, 95 L.Ed. 758]; *Tenney v. Brandhove*, 341 U.S. 367 [71 S.Ct. 783, 95 L.Ed. 1019]; *Collins v. Hardyman*, 341 U.S. 651 [71 S.Ct. 937, 95 L.Ed. 1253]; *Whittington v. Johnston* [5 Cir.] 201 F.2d 810, cert. denied, 346 U.S. 867 [74 S.Ct. 103, 98 L.Ed. 377]; *Francis v. Crafts* [1 Cir.] 203 F.2d 809, cert. denied, 346 U.S. 835 [74 S.Ct. 43, 98 L.Ed. 357]."

#### [In the Lower Federal Courts]

2. In the lower Federal courts. It would serve no useful purpose to review here all the cases decided under the statutes. It is helpful, however, to note that in these courts similar tendencies of restriction and limitation are apparent.

Judge Magruder, concurring in *Cobb v. City of Malden*, 1 Cir., 202 F.2d 701, at page 706, was initially troubled by the apparent breadth of § 1983, but observed:

"This is not the first time that a court has been perplexed by the apparently sweeping and unqualified language of the old Civil Rights Act. 8 U.S.C.A. § 43 seems to say that every person in official position, whether executive, legislative, or judicial, who under

21. *Ex parte Yarborough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (conspiracy to intimidate a negro in the exercise of his right to vote); *United States v. Waddell*, 112 U.S. 76, 5 S.Ct. 35, 28 L.Ed. 673 (conspiracy and overt acts to interfere with a citizen's right to establish a claim under the federal homestead acts); *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (conspiracy to injure a citizen of the United States in the lawful custody of a U. S. Marshal); *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080, and *Motes v. United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (conspiracy to intimidate a citizen in the free exercise of his right to inform for violation of a federal law); *Gunn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (conspiracy to deprive negro citizens of the right to vote at a general election, the defense resting in the grandfather clause of a state constitution); *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (conspiracy by election board officers to disregard precinct returns in a congressional election); *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (alteration and false counting and certification of votes in a primary election); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (conspiracy of election officials to stuff a ballot box at an election for a U. S. Senator); *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (police officers' arrest of negro for a state offense and his death by beating); *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (use of force by special police officer to obtain a confession from a suspect); see *Strauder v. State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (constitutionality of a federal statute, related to the civil rights sections, authorizing removal of a criminal proceeding to Federal court when nonwhites by state statute were not permitted to act as jurors) and *Ex parte State of Virginia*, 100 U.S. 339, 25 L.Ed. 676 (denial of habeas corpus to state judge in custody under Federal indictment charging him for refusing to select qualified negroes as jurors). But see, also, *United States v. Gradwell*, 243 U.S. 476, 37 S.Ct. 407, 61 L.Ed. 857 (conspiracy statute held not sufficient to support an indictment in connection with the stuffing of a congressional primary election ballot box); *United States v. Bathgate*, 246 U.S. 220, 38 S.Ct. 269, 62 L.Ed. 676 (conspiracy statute held not to include a conspiracy to bribe voters at a general election); and *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (motion to quash indictment sustained where there was no showing that State intended its constitutional provision limiting selection of jurors, but antedating the Fifteenth Amendment, to remain effective thereafter).

22. *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (conspiracy to prevent negroes from working or carrying out contracts to labor); *United States v. Powell*, 212 U.S. 564, 29 S.Ct. 630, 53

L.Ed. 653 (conspiracy on the part of a mob which seized a negro from the custody of a sheriff and lynched him); *United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270 (conspiracy to deprive citizens of their right to retain their residence in a particular state); *United States v. Williams*, 341 U.S. 70, 77, 71 S.Ct. 581, 95 L.Ed. 758 (conspiracy by special police officers to injure a citizen by beating him until he confessed to a theft). See *State of Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (where the same removal statute involved in *Strauder v. State of West Virginia*, supra, was held not available where the absence of negroes on a criminal jury was not due to specific state statute, but, if present at all, was due to individual action), and *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588.

color of state law subjects or causes to be subjected any person to the deprivation of any rights secured by the Constitution of the United States, shall be liable in damages to the person injured. . . . Reading the language of the Act in its broadest sweep, it would seem to make no difference that the conduct of the defendants might not have been tortious at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants as a result of their conduct under color of state law have in fact caused harm to the plaintiff by depriving him of rights, etc., secured by the Constitution of the United States.

"Fortunately, *Tenney v. Brandhove*, . . . has relieved us of the necessity of giving the Civil Rights Act such an awesome and unqualified interpretation."

[*Francis v. Lyman*]

He made further observations in speaking for the entire court in *Francis v. Lyman*, at pages 587-588 of 216 F.2d, *supra*:

"When courts come to deal with a statute phrased in terms of such vague generality, they are faced with two possible alternatives: (1) They may give effect to the statute in its literal wording, and thus reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation. This seems to be the approach which the Third Circuit intended to take in its opinion in *Picking v. Pennsylvania R. R. Co.*, 1945, 151 F.2d 240. (2) The courts may refuse to regard the statute as an isolated phenomenon, sticking out like a sore thumb if given a strict, literal application; and upon the contrary may conceive it to be their duty, in applying the statutory language, to fit the statute as harmoniously as may be into the familiar and generally accepted legal background, and to confine its application, within reason, to those situations which might possibly have had the approval of the Congress if it had specifically adverted to the particular cases, bearing in mind the basic purposes which gave rise to the legislation in the first place. . . .

"Where the act has been invoked in situations which no doubt were a major concern

of the Reconstruction Congress—for instance, where members of a state board for the registration of voters have refused to permit the registration of a negro, acting under color of discriminatory state legislation—the Supreme Court has not been loath to impose tort liability upon such state officials under the Civil Rights Act. . . . But beyond such situations, it seems to be the tendency of the decisions to restrict the applications of the Civil Rights Act. . . ."

In areas where the statutes have been acknowledged to have application, it has nevertheless been held that they are not dominant. Thus, the statutes have been held to be subordinate to the principle of judicial immunity.<sup>23</sup> Further, this immunity has been held available for officials in quasi judicial or even other positions,<sup>24</sup> and a concept of qualified immunity has emerged with respect to municipal legislative officers.<sup>25</sup>

[*State-Federal Relationships Considered*]

In the lower federal courts, too, one finds recognition of the tendency "to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue" if the civil rights statutes were too broadly construed. *Francis v. Lyman*, 1 Cir., *supra*, at page 588 of 216 F.2d. And it is repeatedly observed that the statutes are not to be utilized, in the absence of a complete breakdown of law and order,

23. *Tate v. Arnold*, 8 Cir., 223 F.2d 782, 786; *Francis v. Crafts*, 1 Cir., 203 F.2d 809, certiorari denied 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; *Kenney v. Fox*, 6 Cir., 232 F.2d 288, 292, certiorari denied 352 U.S. 855, 856, 77 S.Ct. 84, 1 L.Ed.2d 66; *Skinner v. Nehrt*, 7 Cir., 242 F.2d 573, 575; *Larsen v. Gibson*, 9 Cir., 267 F.2d 386-387.

24. A few examples are *Kenney v. Fox*, 6 Cir., 232 F.2d 288, *supra* (prosecuting attorney, attorney filing confinement papers and state hospital physicians); *Cawley v. Warren*, 7 Cir., 216 F.2d 74 (state's attorney, his assistant and grand jury foreman); *Stafford v. Superior Court*, 9 Cir., 272 F.2d 407 (sheriff); *Agnew v. City of Compton*, 9 Cir., 239 F.2d 226, 231, certiorari denied 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910 (police officers); *Dunn v. Gazzola*, 1 Cir., 216 F.2d 709 (police sergeant, reformatory superintendent and commissioner of correction); *Bartlett v. Weiner*, 7 Cir., 268 F.2d 860, certiorari denied 361 U.S. 938, 80 S.Ct. 380, 4 L.Ed.2d 358 (court appointed physician in commitment proceedings); *Hoffman v. Halden*, 9 Cir., 268 F.2d 280, 300 (jailer and hospital superintendent); *Laughlin v. Rosenman*, 82 U.S. App.D.C. 164, 163 F.2d 838 (assistant to the President and Special Assistant Attorney General).

25. *Cobb v. City of Malden*, 1 Cir., *supra*, at page 707 of 202 F.2d; *Nelson v. Knox*, 6 Cir., 256 F.2d 312, 315.

*Downie v. Powers*, 10 Cir., 193 F.2d 760, 765, to provide a federal forum for the redress of private wrongs, or, to put it another way, that they do not have the effect of taking into Federal control the protection of private rights against invasion by individuals. *Love v. Chandler*, 8 Cir., at page 786 of 124 F.2d, supra; *Moffett v. Commerce Trust Co.*, 8 Cir., at page 247 of 187 F.2d supra; *Shemaitis v. Froemke*, 7 Cir., 189 F.2d 963; *Bottone v. Lindsley*, 10 Cir., 170 F.2d 705, 707, certiorari denied 336 U.S. 944, 69 S.Ct. 810, 93 L.Ed. 1101. Instead, the protection of such rights and redress for such wrongs is left with the state.

#### [Further Federal Court Expressions]

In addition, the general attitude of the federal courts towards actions under these sections can be gleaned from the following: One's "subjection to the necessity of having to stand trial on an unfounded charge did not alone constitute a deprivation of any right, etc., secured by the Constitution of the United States." *Dunn v. Gazzola*, 1 Cir., at page 711 of 216 F.2d, supra. "The Civil Rights Acts were enacted to protect the civil rights of individuals, and not to discipline local law enforcement officers for acts that are later corrected. . . . The common law provides adequate actions for damages against errant law enforcement officials." *Jennings v. Nester*, 7 Cir., 217 F.2d 153, 155, certiorari denied 349 U.S. 953, 75 S.Ct. 888, 99 L.Ed. 1281. "The right not to have private individuals swear falsely in a state court is not a right secured by the Federal Constitution", *Bartlett v. Weimer*, 7 Cir., at page 862 of 268 F.2d, supra. "The right of employment, and its redress when invaded, is exclusively within the domain of the state. It is not a federal civil right." *Ferrer v. Fronton Exhibition Co.*, 5 Cir., 188 F.2d 954, 956. An allegation that "the defendants acted willfully and maliciously . . . adds no strength to the complaint under" the Civil Rights Act. *Whittington v.*

*Johnston*, 5 Cir., 201 F.2d 810, 812, certiorari denied 346 U.S. 867, 74 S.Ct. 103, 98 L.Ed. 377.

These lower federal cases cited are only a sample. But they, quite naturally, display the same trends toward restriction and limitation of § 1983 and § 1985 as we feel are illustrated by the opinions of the Supreme Court which have been outlined in detail.

This review of the Supreme Court and other cases lends no encouragement to any theory that today's civil rights statutes afford the answer to plaintiff's claims. As was said, in *United States v. Williams*, at page 81 of 341 U.S. at page 587 of 71 S.Ct. supra, "The uses to which a statute has been put are strong evidence of the ends it was intended to serve."

#### [District Court Judgment Upheld]

If we may use the figure of speech employed in *Francis v. Lyman*, 1 Cir., at page 588 of 216 F.2d, supra, our feel for the "gloss put upon the statute by the controlling decisions" leads us to the conclusion that the trial court's judgment dismissing the action was correct. This is so (1) because, as in *Snowden v. Hughes*, supra, plaintiff here claims no invalidity of state law or of state constitutional provision but at the most complains of acts said to be improper under the Missouri Constitution, (2) because, as in *Love v. Chandler*, supra, plaintiff's cause of action, if there be one, is for invasion of personal rights for which state laws and state forums provide the avenue of relief, and (3) because the decisions which have been promulgated, both before and since those cases were decided, seem to us clearly to outline a specific and narrow area of applicability of the statutes and one which the plaintiff's case does not reach. At least, we so interpret the statutes until the Congress broadens them or until the Supreme Court tells us otherwise.

The judgment is affirmed.



**CRIMINAL LAW****Age Discrimination—New York****PEOPLE of the State of New York v. Miguel A. MUNOZ, etc.**

Court of Special Sessions of City of New York, Appellate Part, First Department, May 25, 1960, 200 N.Y.S.2d 957.

**SUMMARY:** A New York youth, 16, was arrested and convicted under a New York City ordinance which forbade the possession in a public place of a knife or sharp pointed instrument by any person under 21 years of age. Defendant appealed, arguing that the imposition of this restriction was a violation of the due process and equal protection clauses of the state and federal constitutions. The Court of Special Sessions of New York, Appellate Division, affirmed the conviction, holding that the judgment of the legislating body that the prevalence of crime among persons in the affected age group necessitated such a distinction was a reasonable one and that the restriction was not constitutionally prohibited.

**CRIMINAL LAW****Discriminatory Enforcement—California****PEOPLE of the State of California v. Irene HARRIS.**

Appellate Department, Superior Court, Los Angeles County, California, June 10, 1960, 5 Cal. Rptr. 852.

**SUMMARY:** Eleven Negroes, charged in a Pasadena, California, municipal court with violating a state gambling statute and a city ordinance prohibiting knowingly being present at a place where gambling was being conducted, conceded the facts of gambling and being present thereat provided they be permitted to make an offer of proof as to intentional discrimination and unequal treatment because of race in the enforcement of the statute and ordinance. The offered proof related to community racial population figures and percentages, records showing gambling arrests of far more Negroes than white persons over a three-year period, existence of gambling in white men's clubs without arrests when the police chief was aware of such, and routine police procedure to patrol the colored section and to prowl private premises therein for gambling upon finding grouped parked automobiles, but no such routine for the white section. The offers of proof were rejected by the court, which entered judgments of conviction. On appeal, the appellate department of the superior court reversed and ordered a new trial with directions to admit all competent evidence on the issue of unconstitutional application of the statute and ordinance in question. It was held that appellants should have been permitted to introduce any evidence they offered which tended to show actual intentional discrimination in enforcement of criminal laws in violation of the equal protection guarantees of the federal and state constitutions.

HULS, Judge.

This and ten other cases (CR A 4322 to 4331) are cognate cases (CR A 4322, 4327 and 4330 being appeals from judgments of conviction of violation of Penal Code, § 330 (gambling), and the other eight, from judgments of conviction of violation of Pasadena Ordinance No. 453-34

(knowingly being present at a place where gambling was being conducted).) The facts of the gambling (playing "21" for money) and being present thereat, were stipulated to, provided that the defendants be permitted to make an offer of proof as to the constitutional question of deliberate and intentional discrimination and

unequal treatment in the enforcement of the applicable statute and ordinance, by reason of race and color. "Offers of proof" were made by defendants and argued to the court, which rejected the offers and found each defendant guilty as charged, and fined each \$26.25. (Clerk's Tr. p. 1 for 1/5/60).

From all the trial court's comments in the transcript (especially Tr. 18), we believe that he rejected the offers because he was of the opinion that the evidence if admitted would not prove intentional and deliberate discriminatory enforcement, "even though there may be some slight inference even on the very small scale the offer of proof is made, it falls far short of showing deliberate, intentional, discriminatory practice." (Tr. 17).

We are not considering the affidavits brought up to us on respondent's motion to augment the record, for the reason that there is nothing in the record to show that they were before the trial court which heard the evidence and the offers of proof. The contents of the affidavits might have become the subject of evidence in rebuttal by the prosecution had the court determined that any or all of the offers of proof should have been granted. The real questions before us are as to the admissibility of such evidence, not as to its ultimate weight or effect, and whether the trial court committed prejudicial error in rejecting them.

#### [Offers of Proof]

The offers of proof were:

1. Racial population figures and percentages in Pasadena.
2. Record of Pasadena gambling arrests showing for the year 1957, 16 white persons arrested, 276 negroes; 1958, 9 white, 82 negroes; 1959, all persons arrested negroes.
3. Existence of gambling for years in three men's clubs, all members of which were white, and no arrests made. That the Chief of Police was a member of one of the clubs and aware of the gambling.
4. One of the arresting officers would testify the routine city police procedure was to patrol the colored section and, on finding grouped parked cars, prowl the private premises for gambling, with no like patrol in the white section and no investigation made when cars were

so parked in white areas. That no arrests were made when, shortly before the instant arrests, police found white men gambling, some of them city police officers.

5 and 6. Somewhat similar testimony by an arresting officer, and another officer.

#### [The Constitutional Question]

The question before us is whether the offered proof was admissible as tending to show deliberate and intentional racial discriminatory enforcement of the criminal laws in violation of the equal protection guarantee of the 14th Amendment to the Constitution of the United States and of Article 1, section 11, of the Constitution of the State of California.

The question has been raised in actions for injunction, by habeas corpus and as a defense on appeal from judgments of conviction in criminal cases.

A pleading alleging intentional and deliberate enforcement of a criminal ordinance fair on its face was held to be within the principle announced in *Yick Wo v. Hopkins*, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and followed in *Brock v. Superior Court*, 1939, 12 Cal.2d 605, 610, 86 P.2d 805, and in the case of *Wade v. City and County of San Francisco*, 1947, 82 Cal. App.2d 337, 338-339, 186 P.2d 181. The plaintiff there was seeking injunctive relief and the court also held the pleading to be squarely within the rule announced in *Glicker v. Michigan Liquor Control Commission*, 6 Cir., 1947, 160 F.2d 96; *Snowden v. Hughes*, 1943, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497; and *Sunday Lake Iron Co. v. Township of Wakefield*, 1918, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154. *People v. Gordon*, 1951, 105 Cal. App. 2d 711, 721, 234 P.2d 287, was another case involving injunctive relief, the court citing *Brock v. Superior Court*, supra; *Downing v. California State Board of Pharmacy*, 1948, 85 Cal.App. 2d 30, 36, 192 P.2d 39; and *Wade v. City and County of San Francisco*, supra.

#### [Equity Intervention Unnecessary]

If equity will intervene to prevent discriminatory enforcement of an ordinance valid on its face, it would seem to be unnecessary to require such intervention as a prerequisite, when the constitutional question has been squarely raised and the objection to prosecution made as a defense in a criminal proceeding.

The question here raised was before the court on a petition for habeas corpus in the cases of *Ah Sin v. Wittman*, 1905, 198 U.S. 500, 506, 25 S.Ct. 756, 49 L.Ed. 1142, and *Ex parte Fiske*, 1887, 72 Cal. 125, 128-130, 13 P.310, 312. The court in the latter case, with respect to the ordinance there under consideration, after discussing the *Yick Wo* case, *supra*, said, "Neither the face of the ordinance, nor its administration, shows any intent to discriminate against a class of persons, or against any person."

#### [*Yick Wo Case*]

The *Yick Wo* case, *supra*, has been extensively cited in cases involving laws both valid and invalid on their face. While a distinction may be attempted on this disparity, it should be noted that in *East Coast Lumber Terminal, Inc. v. Babylon*, 2 Cir., 1949, 174 F.2d 106, 112, 8 A.L.R.2d 1219, the Federal court observed: "It has indeed been the law for over sixty years that the Amendment covers the unequal enforcement of valid laws, as well as any enforcement of invalid laws." See, also *Concordia F. Ins. Co. v. Illinois*, 1934, 292 U.S. 535, 545-547, 54 S.Ct. 830, 78 L.Ed. 1411, 1418-1419. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, *supra*, 247 U.S. at page 352, 38 S.Ct. at page 495. An actual discrimination arising from the method of administering a law is as potential in creating a denial of equality of rights as discrimination made by law. *Rogers v. State of Alabama*, 1904, 192 U.S. 226, 231, 24 S.Ct. 257, 48 L.Ed. 417, 419. In *Glicker v. Michigan Liquor Control Commission*, *supra*, 160 F.2d 96, 99, a case involving denial of a renewal of a liquor license, the court, quoting from *Truax v. Corrigan*, 1921, 257 U.S. 312, 331, 42 S.Ct. 124, 128, 66 L.Ed. 254, said: "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process." See also *People v. Darcy*, 1943, 59 Cal.App.2d 342, 352, 139 P.2d 118.

In reversing a judgment of conviction of a

violation of an ordinance for illegally obstructing a public sidewalk, *People v. Amdur*, 1954, 123 Cal.App.2d Supp. at pages 969-971, 267 456, recognizing the principles above referred to, stated "Fundamental personal rights are not less sacred and not less entitled to injunctive protection than are property rights" (see also 123 Cal. App.2d Supp. at pages 969-971, 267 P.2d at pages 456-457) and ordered a new trial with directions to admit all competent evidence offered on the issue of the unconstitutional application of the ordinance in question.

Convictions of negroes, after trial upon indictments returned by grand juries from which negroes had been systematically excluded, have been reversed on the grounds of a denial of equal protection. *Eubanks v. Louisiana*, 1958, 358 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991, 994-995. See also Annotation 2 L.Ed.2d 2040-2044.

An unconstitutional application of an ordinance is always available as a defense to prosecution for violation thereof. *People v. Amdur*, *supra*, 123 Cal.App.2d Supp. 951, 970, 267 P.2d 445, citing *Yick Wo v. Hopkins*, *supra*, and *In re Smith*, 1904, 143 Cal. 368, 77 P. 180. Similarly, conviction of members of a religious sect warranted the application of the equal protection guarantee. *Niemotko v. Maryland*, 1951, 340 U.S. 268, 270, 71 S.Ct. 325, 95 L.Ed. 267, 270, *Fowler v. State of Rhode Island*, 1953, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828; *People v. Flanders*, 1956, 140 Cal.App.2d 765, 766, 296 P.2d 13 (not decisive here, since there, unlike our cases, there was no defense on or evidence of discriminatory enforcement).

"Upon trial, defendants are entitled to present proof, if any, that there has been intentional discrimination, based on any improper consideration. Discriminatory law enforcement, to constitute a want of due process of law, and a denial of the equal protection of the laws, must be intentional, and purposeful. It will not be presumed, and before it can be established, proof thereof must be judicially made." *People v. Winters*, 1959, 171 Cal.App.2d Supp. 876, 883, 342 P.2d 538, 543. See also *Ex parte Fiske*, *supra*; *Wade v. City and County of San Francisco*, *supra*; *People v. Gordon*, *supra*; *People v. Amdur*, *supra*; *Ah Sin v. Wittman*, *supra*.

#### [*Error of Trial Court*]

The appellants should have been permitted to introduce any evidence they offered which tended to show actual intentional discrimina-

tion in the enforcement of the statute and ordinance in this instance. We are not holding that the offered evidence proves the defense of discriminatory enforcement; we are merely holding that it was admissible in appellants' efforts to prove that defense. It is wholly unsatisfactory to determine whether that defense was sufficient merely on an offer of proof.

The judgment is reversed. A new trial is ordered, with directions to admit all competent evidence not inconsistent with this opinion on the issue of the unconstitutional application of the statute and ordinance in question.

SWAIN, P. J., and SMITH, J., concur.

## CRIMINAL LAW

### Extradition—New Jersey

#### Application of Floyd C. LEE for Writ of Habeas Corpus.

Superior Court of New Jersey, Appellate Division, June 21, 1960, 161 A.2d 759.

**SUMMARY:** A man convicted of a crime and serving a sentence in a North Carolina prison camp escaped to New Jersey, where he was subsequently confined in a county jail under an extradition warrant. In a habeas corpus proceeding in the New Jersey superior court he contended that his confinement was illegal and violative of the United States Constitution because it was for the purpose of returning him to the status of a prisoner deprived of constitutional rights in that North Carolina penal institutions are segregated. The writ was issued but later dismissed, the court holding that applicant's recourse must be to the North Carolina courts, and that New Jersey courts could not interfere with the New Jersey governor's warrant of rendition upon the grounds alleged. On appeal, the applicant contended that the court below was obliged to halt the extradition because it would necessarily result in his incarceration in a segregated institution; but the superior court's appellate division affirmed on the basis of a United States Supreme Court precedent.

#### PER CURIAM.

Floyd C. Lee filed his complaint for a writ of *habeas corpus*, alleging that he is confined in the Middlesex County jail by virtue of a warrant for extradition to the State of North Carolina signed by Governor Meyner, and that the "confinement and detention are illegal" because:

"\* \* \* B. To return the said plaintiff to the State of North Carolina is to return the plaintiff to a status as a prisoner in which he is deprived of his constitutional rights as a citizen of the United States because the prison and prison camps of North Carolina are segregated.

"C. Thus, the confinement and detention of the plaintiff by the State of New Jersey in order to effectuate a return of the plaintiff to the State of North Carolina, and the returning of said plaintiff by the State of

New Jersey to North Carolina are a violation of the United States Constitution."

Lee therefore demanded that he "be discharged from custody and released from his confinement."

The writ was issued, but, following a hearing before the Law Division, it was dismissed and Lee was "remanded unto the custody of the Sheriff of the County of Middlesex for extradition." Lee appeals, contending that rendition is unconstitutional because it will necessarily result in his incarceration in a segregated institution, and therefore the court below was obliged to halt the extradition.

It is not disputed that Lee was convicted of a crime in North Carolina and, while serving his sentence, he escaped from a prison camp; nor is it denied that the North Carolina penal institutions are segregated.

The court below held that Lee's recourse must



be to the courts of North Carolina, and that the courts of this state may not interfere with the Governor's warrant of rendition upon the grounds here alleged. Lee's position has been ably and forcefully presented by his assigned counsel.

However, we agree with the disposition of the case made by the trial court. *Sweeney v. Woodall*, 344 U.S. 88, 97 L.Ed. 114, 73 S.Ct. 139 (1953).

Affirm.

## ELECTIONS

### Registration—Alabama

**STATE OF ALABAMA ex rel. MacDonald GALLION, Attorney General of Alabama, Complainant v. William P. ROGERS, Attorney General of the United States, et al., Respondents.**

Circuit Court of Montgomery County, Alabama, In Equity, June 6, 1960, Case No. 34854.

**STATE OF ALABAMA ex rel. MacDonald GALLION, Attorney General of Alabama, Complainant v. William P. ROGERS, Attorney General of the United States, et al., Respondents. In Re Crum DINKENS, et al., Members of the Board of Registrars, Montgomery County, Alabama.**

United States District Court, Middle District, Alabama, Northern Division, August 11, 1960, Civil Action Nos. 1616-N, 1619-N.

**In re Crum DINKENS, et al., Members of the Board of Registrars, Montgomery County, Alabama.**

United States Court of Appeals, Fifth Circuit, August 24, 1960, No. 18562.

**SUMMARY:** Pursuant to Title III of the Civil Rights Act of 1960 [5 Race Rel. L. Rep. 237 (1960)], the Attorney General of the United States sought to have a federal district court order members of the Montgomery County, Alabama, Board of Registrars to produce records and papers within their possession or control relating to any act requisite to voting. The board members moved to strike and dismiss that action, and the board answered and sought to file a cross complaint asking the court to enjoin the enforcement and application of Title III on the ground that the Act (so far as it authorizes the Attorney General to inspect records) is unconstitutional. The board further contended that the order sought by the Attorney General has the effect of an injunction against the enforcement of a state statute and therefore requires a three-judge court. Alleging that the 1960 Civil Rights Act is unconstitutional, the state attorney general then obtained from a state circuit court a temporary injunction and restraining order forbidding the United States Attorney General from inspecting or copying records and papers of the boards of registrars of the various counties of the state. The United States Attorney General removed the state court action into the federal district court, where he moved to dismiss it and the state attorney general moved to remand. The federal court consolidated the two proceedings. First, the court held that the state court lacked authority to enjoin action by the United States Attorney General because Section 305 of Title III vests jurisdiction in federal district courts and apparently Congress intended it to be exclusive, and because state courts have no jurisdiction to review the discretion or enjoin the acts of federal officers. It was also held that the state court's order was premature and totally without legal effect because it proscribed action in all 67 Alabama counties, whereas the United States Attorney General had not taken (and probably had not contemplated taking) action in a great majority of them. The motion to remand was therefore denied, and the motion to dismiss the removed proceeding was granted. As to the United States Attorney General's original proceeding, the court overruled

motions of the board to strike and dismiss, granted his motion to strike and dismiss the registrar's cross complaint, and granted as requested the application for an order to require the production of records for inspection, reproduction, and copying. The court held that Congress' constitutional authority to pass Title III "cannot be seriously questioned" and that the state's contention that it is not authorized or appropriate legislation "is clearly wrong" in view of cited authority and Congress' power to protect voters possessing the particular qualifications specified by the states. The court also overruled the state's complaint that the Attorney General's request was uncertain and the statute vague, determining that the request very closely follows the wording of the statute and that the prescribed statutory standard is clear and unambiguous. The cross complaint was dismissed for improperly seeking to counterclaim for declaratory relief concerning matters at issue in the original suit. Noting that the injunctive relief thereby sought was defensive, the court further held that its determination that Title III is constitutional rendered the counterclaim without merit. It also ruled against the contention that the counterclaim required that the case be determined by a three-judge court, because a case is not properly heard by such a court unless an injunction is sought to restrain the enforcement of an allegedly unconstitutional congressional act. And it was held that Title III does not violate the Constitution's *ex post facto* clause, which is limited to criminal proceedings, because the challenged provisions of the Civil Rights Act of 1960 operate only prospectively as to criminal prosecutions. Subsequently, the registrars applied to the chief judge of the Court of Appeals for the Fifth Circuit for a stay of the district court's order and judgment granting the Attorney General's application, the registrars alleging that the order is too broad and directs records and papers to be made available which are not required by Section 301 of Title III to be preserved. The stay was granted until further order of the Court of Appeals (provided that the registrars continue to preserve all of the records and papers covered by the order below) so that this application for stay could be considered by another panel of the court which was presently to consider an application for stay in a different case.

## Injunction in State Court

The verified Bill of Complaint in the above styled cause being presented to the Court, and upon consideration of same, it is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That the 7th day of July, 1960 at 10:00 o'clock A.M. be and the same is hereby fixed as the date for the respondents to appear in this Court and show cause, if any they have, why the prayer of the said Bill should not be granted, and that pending the said hearing, the respondents, and each of them, be and they are hereby temporarily restrained from the acts complained of in the said Bill of Complaint, and more specifically, it is ORDERED, ADJUDGED and DECREED by the Court,

2. That each of the respondents to this suit, their agents, servants, employees and attorneys, while acting within the line and scope of their employment, are temporarily enjoined and restrained from examining, inspecting, reproducing or copying the records and papers in the

custody, possession and control of the several Boards of Registrars of the various counties of Alabama, under the color of authority purportedly given to the said respondent, Attorney General of the United States by the "Civil Rights Act of 1960."

3. That this temporary injunction and restraining order shall remain in full force and effect until such time as the cause is finally heard and determined by the Circuit Court of Montgomery County, Alabama.

The Register of the Circuit Court for Montgomery County, Alabama, is hereby ordered to issue said Writ of Temporary Injunction or restraining order, the same being returnable to the Circuit Court of Montgomery County, Alabama, In Equity Sitting.

All other questions are reserved.

DONE, this the 6th day of June, 1960.

s/Walt B. Jones

Circuit Judge, In Equity Sitting

## WRIT

WHEREAS, the State of Alabama, on the relation of MacDonald Gallion, as Attorney General of the State of Alabama, has exhibited a bill of complaint in Equity, in the Circuit Court of Montgomery County, Alabama, and has obtained from the Honorable Walter B. Jones, an order for the issuance of an injunction to enjoin you as hereinafter mentioned.

NOW, THEREFORE, you the said William P. Rogers, as Attorney General of the United States; Joseph M. F. Ryan, as Acting Assistant Attorney General of the United States, Civil Rights Division; J. Edgar Hoover, as Director of the Federal Bureau of Investigation; R. B. Miller, as Special Agent in Charge, Federal Bureau of Investigation; Spencer H. Robb, Senior Resident Agent, Federal Bureau of Investigation, and John Doe and Richard Roe, being the person or persons who have been directed by the Attorney General of the United States to obtain records and papers pertaining to acts requisite to voting in the counties of the State

of Alabama, your agents, servants, employees and attorneys, while acting in the line and scope of their employment are enjoined and restrained from attempting to enforce the demand of the respondent William P. Rogers, as Attorney General of the United States to the members of the Board of Registrars of any county in the State of Alabama, and from examining, inspecting, reproducing or copying the records and papers in the custody, possession, and control of Boards of Registrars in said counties, as set out more particularly in said demand aforementioned pursuant to or under the color of authority purportedly given the said respondent Attorney General of the United States by the "Civil Rights Act of 1960," and this Injunction you are required to obey under the penalties of the law, until the further orders of the Court.

Witness my hand, this the 8th day of June, 1960.

s/George Jones  
Register of the Circuit Court of  
Montgomery County, Alabama, In Equity

## Opinion in U. S. District Court

In Civil Action No. 1619-N, as above captioned, the Attorney General of the United States, acting pursuant to Title III of the Civil Rights Act of 1960 (P. L. 86-449, 74 Stat. 86), seeks to have this Court enter an order directed to the members of the Board of Registrars of Montgomery County, Alabama, for the production of all records and papers in their possession or under their control relating to any application, registration, payment of poll tax, or other act requisite to voting.

To this action, the members of the Board of Registrars seek to have this Court strike and dismiss. The Board also answers and seeks to file a cross complaint, asking this Court to enter an injunction against the enforcement and application of Title III of the Civil Rights Act of 1960 on the grounds that said Act (insofar as it authorizes the Attorney General of the United States to inspect records) is unconstitutional. The Board of Registrars says further that the order sought by the Attorney General of the United States has the effect of an injunction against the enforcement or execution of a state statute and therefore requires a three-judge court within the contemplation of Title 28, Section 2281, United States Code.

## [Attorney General's Demands]

The demands of the Attorney General to inspect, etc., the records of the Montgomery Board of Registrars was made and served on May 23, 1960; compliance was requested within fifteen days. On the 6th day of June, 1960, the Attorney General for the State of Alabama sought and obtained from the Circuit Court of Montgomery County, Alabama, a temporary injunction and restraining order forbidding the Attorney General of the United States, his "agents, servants, employees and attorneys . . ." to inspect or copy the records and papers in the possession, custody and control of the "several Boards of Registrars of the various counties of Alabama, under the color of authority purportedly given . . . by the 'Civil Rights Act of 1960'".

The state court's injunction was predicated upon the allegations (in the complaint) that the Civil Rights Act of 1960 was unconstitutional and void.

The state court action was removed (28 U.S.C.A. 1442) to this Court as Civil Action No. 1616-N, by the Attorney General of the United States. Now pending and submitted in this action is the motion of the Attorney General of

the United States to dismiss and the motion of the Attorney General of Alabama to remand.

Since the issues on the merits are common to the two proceedings, they have been consolidated for argument and submission.

There are only two basic legal questions involved in these proceedings: the authority of the circuit court of the State of Alabama to enjoin the action of the Attorney General of the United States as it did in its order on June 6, 1960, and the constitutionality of Title III of the Civil Rights Act of 1960.

These questions will be discussed and dealt with by this Court in that sequence.

#### THE CIRCUIT COURT'S INJUNCTION:

Section 305 of Title III of the Civil Rights Act of 1960<sup>1</sup> vests jurisdiction for the settlement of disputes under that Title in the federal district courts. There is nothing in the language or legislative history that permits the conclusion that the jurisdiction of the federal district courts is to be shared with the courts of the various states. Rather, the entire history of the Act reflects that it was and is designed to provide a means of enforcing the basic federally guaranteed rights of citizenship (to vote) against state action. It is apparent to this Court that Congress did not intend this jurisdiction to be concurrent with state courts, since such would be incompatible from the "particular nature of the case." *Claffin v. Houseman*, 93 U.S. 130; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236.

Such action by state courts in matters exclusively within the jurisdiction of the federal courts cannot be tolerated without there being created frustration of national purposes. *Bowles v. Willingham*, 321 U.S. 503; *Garner v. Teamsters Union*, 346 U.S. 485.

The invocation of this basic legal principle works no hardship or injustice on the Board of Registrars; they have—when and if there is threat of injury—a judicial forum in which to litigate (i.e., the United States courts) and a definite judicial procedure to follow.

Aside from the fact that the jurisdiction conferred by Section 305 of the Act is exclusively

vested in the United States district courts, the state court action in issuing its injunction of June 6, 1960,<sup>2</sup> was in violation of the basic legal principle that state courts are without jurisdiction to review the discretion or enjoin the acts of federal officers. Here the Attorney General of the United States made his request of May 23, 1960, in the exercise of the discretion vested in him by Section 303 of Title III of the Civil Rights Act of 1960.<sup>3</sup> One of the recent cases restating this principle is *Rogers v. Calumet National Bank*, 358 U.S. 331 (1959), with the Supreme Court stating:

"... a state court is without power to review the discretion exercised by the Attorney General of the United States under federal law."

It necessarily follows that if a state court is without jurisdiction to review the exercise of discretion by a federal official, it may not take affirmative action in the form of an injunction to prevent such official from carrying out his statutory duties. *Tarble's Case*, 13 Wall. 397; *Keely v. Sanders*, 99 U.S. 441.

Examining still further the state court's injunction of June 6, 1960, it appears that the injunction proscribes action in all sixty-seven counties of the State of Alabama; this without any action by the Attorney General of the United States being taken (and probably not contemplated) in a great majority of those counties. It is quite obvious that since there has been no demand of registrars in a great majority of the counties, the state court order, insofar as it attempts to affect action of the Attorney General of the United States (in counties other than Montgomery) was premature and totally without legal effect.

Because of the several sound and basic reasons supporting this Court's conclusion that the action

1. "SEC. 305. The United States district court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper."

2. The objection of the State of Alabama to the removal of Civil Action No. 1616-N is without merit. Section 1442(a) (1) of 28 U.S.C.A. affords a basis for such removals where the civil action is brought against the federal official "for any act under color of such office." (Also see *DeBusk v. Harvin*, 212 F.2d 143 (CCA 5).)

3. "SEC. 303. Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor."



of the state court is without authority and void, it is not considered necessary to go into or discuss at length at this point in this opinion the proposition that the suit filed by the Attorney General for the State of Alabama was a suit against the United States and therefore unauthorized. This point will be treated more thoroughly in discussing the cross complaint filed in Civil Action No. 1619-N.

As to Civil Action No. 1616-N, it is therefore clear that the circuit court of Montgomery County was without jurisdiction to act; the motion of the State of Alabama to remand is to be denied and the motion of the Attorney General of the United States (and the other respondents) to dismiss said action is to be granted.

#### THE CONSTITUTIONALITY OF TITLE III

Preliminary to discussing the questions raised concerning the constitutionality of Title III of the Civil Rights Act of 1960, it is appropriate to look to its purpose. The legislative history leaves no doubt but that it is designed to secure a more effective protection of the right to vote.<sup>4</sup>

Title III provides—if properly applied and enforced—an effective means whereby preliminary investigations of registration practices can be made in order to determine whether or not such practices conform to constitutional principles. Quoting from a decision of this Court in *In re Wallace*, 170 F. Supp. 63 (M.D. Ala. 1959), the House Committee referred to Title III as “an essential step in the process of enforcing and protecting the right to vote . . .”<sup>5</sup>

The constitutional authority of Congress to pass Title III of the Civil Rights Act of 1960 cannot be seriously questioned. See *Hannah v. Larche*, — U. S. —, June, 1960; *United States v. Raines*, 362 U.S. 17 (1960); *United States v. Classic*, 313 U.S. 299, and the very recent decision of the three-judge district court in *United States v. The Association of Citizens Councils of La., Inc., etc.*, No. 7881 Civil, rendered July 27, 1960, in the United States District Court for the Western District of Louisiana, Shreveport Division.

4. State action such as taken by the Alabama legislature authorizing registrars to destroy their records is an excellent example.

5. House Report No. 956, 86th Congress, 1st Session, p. 7.

#### “Appropriate Legislation

The contention herein made by the State of Alabama, etc., that Title III of the Act is not authorized or “appropriate legislation” is clearly wrong.<sup>6</sup> Some of the prior cases dealing with such a contention are *Yick Wo v. Hopkins*, 118 U.S. 356; *Terry v. Adams*, 345 U.S. 461; *Hannah v. Larche*, supra; see also this Court’s opinion in *In re Wallace*, supra, where it was stated:

“The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered ‘appropriate legislation’ within the meaning of Section 2 of the Fifteenth Amendment.”

Although the particular qualifications one must possess to exercise this right to vote are left to the states—as long as that exercise is within the constitutional framework—the power to protect voters who are qualified is confided to the Congress of the United States.

#### [*Hannah v. Larche Interpreted*]

The interpretation and reliance by the State of Alabama on *Hannah v. Larche*, supra, as support for the contention that records may not be required to be produced where the agency seeking production has the power to use such records in its prosecutive function, is misplaced.

6. Such a contention overlooks that the Fourteenth Amendment to the Constitution provides:

“Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

“Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.”

And also that the Fifteenth Amendment provides:

“Section 1. The right of citizens of the United States to vote shall not be denied or abridged . . . by any State . . .”

“Section 2. The Congress shall have the power to enforce this article by appropriate legislation.”

In the opinion of this Court, that portion of the majority opinion in *Hannah v. Larche* was for the purpose of distinguishing *not* between agencies having prosecutive functions and those not having such functions, but rather between *investigations* and *adjudications*, regardless of the agency involved. The basis for this Court so concluding is found in that Court's statement:

"On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable."

"The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. The best example is provided by the administrative regulatory agencies. *Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations.*" (Emphasis supplied.)

And in connection with that Court's discussion of the actions by the Securities and Exchange Commission, it was stated:

"Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined, *id.*, 1959 Supp., § 201.3, and a right to cross-examine witnesses appearing at the hearing, *id.*, § 201.5, those provisions of the Rules are made specifically inapplicable to investigations, *id.*, § 201.20, *even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law.* Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures." (Emphasis supplied.)

The distinction lies in the *function* being exercised. Here the function sought to be exercised by the Attorney General is—as in *Hannah*—

purely investigative. See also the case of *In re Groban*, 352 U.S. 330, relied upon by those members of the Supreme Court who joined in the majority opinion rendered in *Hannah*.

The complaint by the State of Alabama that the Attorney General's request is vague and the statute is uncertain is without merit. The demand to the registrars made by the Attorney General on May 23, 1960, follows almost exactly the pertinent wording in Sections 301 and 303 of the Act.

There is nothing uncertain about that part of the Act requiring the preservation and production of *all* records and papers which are in the possession of an election official (the members of the Montgomery County Board of Registrars in this case) if those records and papers relate to the acts requisite to voting. This Court concludes that the prescribed standard of Section 301 is clear and unambiguous and was not exceeded by the Attorney General's demand made pursuant to Section 303. Regardless of when these records came into the possession of the election official,<sup>7</sup> under Section 301 they must be retained and preserved for a period of twenty-two months "from the date of any general, special, or primary election . . ." if they relate to acts requisite to voting in such election.

As to the cross complaint which the registrars filed in Civil Action No. 1619-N, it must be dismissed since it improperly seeks to counterclaim for declaratory relief where matter on which relief is sought is in issue in the original suit. Moreover, in this case the affirmative relief (by injunction) sought is obviously defensive; this Court's determination that Title III is constitutional renders the counterclaim without merit.

The claim by the registrars that their counterclaim requires this case to be determined by a three-judge court is likewise without merit. A case is not properly heard by a three-judge district court unless an injunction is sought restraining the enforcement of an Act of Congress on a ground that it is repugnant to the Constitution of the United States. 28 U.S.C.A. 2282. The mere fact that the constitutionality of an Act of Congress is presented does not make the case a proper one for a three-judge court, for the jurisdiction of such a court is limited. *Hall v. Welch*, 185 F.2d 525, and *Phillips v. United States*, 312 U.S. 246.

7. In this case, the Montgomery County registrars have not destroyed the records they possessed prior to the passage and approval of the 1960 Civil Rights Act on May 6, 1960.

The contention that Title III of the Act violates the *ex post facto* clause of Article I, Section 9, of the United States Constitution, is unsound. The disposition of such a contention by the court in *United States v. The Association of Citizens Councils of La., Inc.*, supra, is applicable here:

"The defendants rely heavily on the contention that Section 301 of the Act violates the *ex post facto* clause of Article I, Section 9, of the United States Constitution. We find no violation of this clause, since Section 301 operates only prospectively and not retrospectively as to any criminal prosecution. It is well settled, of course, that the prohibition against *ex post facto* legislation applies only to criminal proceedings and not to civil matters such as this. We note that Section 302 of the Act, covering criminal prosecution for the destruction of records, does not permit punishment for destructions prior to May 6, 1960, the effective date of the Act."

The other several miscellaneous "defenses" asserted by the state officials appear to be in the nature of "bootstrap" defenses and do not merit discussion.

For the foregoing reasons, the motions of the Board of Registrars to strike and to dismiss the application of the Attorney General for an order to require the production of records are to be overruled and denied; the motion of the Attorney General of the United States to strike and dismiss the registrars' cross complaint is to be granted, and the application for an order to require the production of records for inspection, reproduction and copying, said application filed with this Court on June 13, 1960, is to be granted.

Formal orders will be entered accordingly.

## ORDER AND JUDGMENT

Upon the application of the Attorney General of the United States made to this Court on the 13th day of June, 1960, and pursuant to Section 303 of Title III of the Civil Rights Act of 1960 (P.L. 86-449, 74 Stat. 88), and for the reasons set forth in the opinion of this Court made and filed herein on this date, it is the ORDER, JUDGMENT and DECREE of this Court that Crum Dinkens, Mrs. Robert S. Lampley and George Penton, as Registrars of Montgomery County, Alabama, and/or their successors in office, make available to the Attorney General of the United States and/or his authorized representatives, all records and papers in their custody, possession or control, relating to any application, registration, payment of poll tax, or other act requisite to voting in any general, special or primary election in which candidates for the office of President, Vice President, Presidential Elector, Member of the Senate or Member of the House of Representatives of the United States, are voted for.

It is further ORDERED and DIRECTED that the said Crum Dinkens, Mrs. Robert S. Lampley and George Penton and/or their successors in office, make such records and papers available for inspection, reproduction and copying at the office of the Montgomery County Board of Registrars, Montgomery, Alabama, within fifteen days of the date of service of this order upon either of said registrars, and for such period as may be reasonably necessary to complete such inspection, reproduction and copying.

The Clerk of this Court is ORDERED and DIRECTED to forward certified copies of this order to the United States Marshal for this district for personal service upon Crum Dinkens, Mrs. Robert S. Lampley, George Penton, and/or their successors in office.

## Stay Order in Court of Appeals

The Members of the Board of Registrars of Montgomery County, pursuant to Rule 62 (g) of the Federal Rules of Civil Procedure, have applied to me for a stay of the order and judgment of the District Court of date August 11, 1960, directing said registrars to make available for inspection, reproduction and copying, within fifteen (15) days from date of service of said order, all records and papers in their custody,

possession or control relating to any application, registration, payment of poll tax, or other act requisite to voting in any general, special or primary election in which candidates for the office of President, Vice President, Presidential Elector, Member of the Senate or Member of the House of Representatives of the United States are voted for.

A somewhat similar application for stay of pro-

ceedings pending appeal was considered by this Court, the Court consisting of Judges Tuttle, Wisdom and myself, in No. 18476—Henry Earl Palmer, Registrar of the Parish of East Feliciana, Louisiana, and the motion for stay in that cause was denied. The present application for stay presents at least one question not considered and decided in said former case; that is, whether the order of the District Court is too broad and directs records and papers to be made available for inspection, reproduction and copying, etc., which are not required by Section 301 of Title III of the Civil Rights Act of 1960 to be retained and preserved.

Another panel of this Court, consisting of Judges Jones, Brown and myself, is presently to consider an application for stay in an entirely different case. It will be convenient for that panel of this Court also to consider the present application for stay. I am of the opinion that I should grant the stay requested until the further order of this Court.

It is accordingly ordered that the order and judgment of the District Court, dated August 11,

1960, be and the same is hereby stayed until the further order of this Court; provided that the said registrars shall continue to preserve and keep safely all of the records and papers in their custody, possession or control covered by the said order of the District Court.

It is contemplated that this Court will give prompt consideration to the question of whether said order and judgment should continue to be stayed during the pendency of this appeal; and to that end, the Attorneys for the Board of Registrars are directed to file their briefs in support of such stay, which briefs may be typed rather than printed, within ten (10) days from the date of this order. The Attorney General of the United States may likewise file briefs, also typed instead of printed if he so desires, within ten (10) days from the date of the receipt by him or his office of a copy of the briefs on behalf of the Board of Registrars. In order to expedite the hearing, it is requested that all briefs be mailed directly to the three judges composing said Court, Judges Jones, Brown and myself, with a copy to the Clerk of this Court.

## ELECTIONS

### Registration—Civil Rights Act

#### **The UNITED STATES OF AMERICA v. ASSOCIATION OF CITIZENS COUNCILS OF LOUISIANA et al., etc.**

United States District Court, Western District, Louisiana, Shreveport Division, July 27, 1960, Civil Action No. 7881.

**SUMMARY:** The United States filed an action in a federal district court against certain individuals and organizations charging deprivation of the voting rights of Negroes. The government filed a motion to preserve and produce records of registrations. Defendants challenged the Civil Rights Act of 1957, alleging that the portions of the Act requiring preservation and production of records are unconstitutional, and also that other parts violate the *ex post facto* proscription in Article I of the Constitution. A three-judge court was convened to hear the constitutional question, and the court ruled that the motion to produce was not filed under the Civil Rights Act, but rather under the Federal Rules of Procedure, and that therefore no constitutional issue was raised in this aspect of the case. As to the *ex post facto* question, the court ruled that the statute operated only prospectively, and also that *ex post facto* objections could not be raised in a civil matter. The three-judge court dissolved itself.

Per Curiam

The defendants have attacked the constitutionality of the Civil Rights Act of 1960 on a

number of grounds. However, the Supreme Court's sweeping approval of the Civil Rights Act of 1957 makes it unnecessary to discuss the defendants' contentions at great length. U. S. v.



Raines, 362 U.S. 17 (1960); *Hannah v. Larche*, 28 U.S.L.W. 2514 (1960).

The constitutional attack is levelled at Titles III and VI of the Act. We find that the constitutionality of Title III, dealing with the preservation and production of voting records, is not at issue in this case. The Government's motion to produce was filed, not under Title III of the Act, but under Rule 34 of Federal Rules of Civil Procedure. The chief purpose of the provisions of Title III, dealing with the preservation and production of records, is to facilitate the investigation of the records before suit is filed. The chief purpose of Rule 34, however, is to give a party litigant the right to have records produced after suit has been filed.

The defendants rely heavily on the contention that Section 301 of the Act violates the *ex post facto* clause of Article I, Section 9, of the United States Constitution. We find no violation of this clause, since Section 301 operates only prospectively and not retrospectively as to any criminal prosecution. It is well settled, of course, that the prohibition against *ex post facto* legislation applies only to criminal proceedings and not to civil matters such as this. We note that Section 302 of the Act, covering criminal prosecution for the destruction of records, does not permit punishment for destructions prior to May 6, 1960, the effective date of the Act.

The individual defendants and the Citizens

Councils contend that the Fourteenth and Fifteenth Amendments are limited to state action, as distinguished from individual private action, and that, therefore, Title VI of the 1960 Civil Rights Act is unconstitutional in its attempted application as to them. The acts complained of triggered actions on the part of the Registrar that were ministerial under State law. We are compelled to hold that the alleged action taken by the individual defendants and Citizens Councils constituted state action within the meaning of that term as held in the decided cases. *Smith v. Allwright*, 321 U. S. 649, 664; *U. S. v. McElveen*, 177 F.Supp. 355; 180 F.Supp. 10, Aff. sub nom. *U. S. v. Thomas*, 362 U.S. 58.

Finally, the Citizens Councils contend that the Fourteenth and Fifteenth Amendments were adopted unconstitutionally. With all deference to able counsel, we find ourselves unable to agree with this contention in the light of the hundreds of cases in which the United States Supreme Court has applied these Amendments.

Since we find the arguments alleging unconstitutionality to be without merit, this three-Judge Court is hereby dissolved.

In rendering this opinion, we are in no way expressing any views on the merits of the case. We are not holding that there was discrimination or that there was not discrimination. That question and others will be resolved by the one-Judge Court.

## ELECTIONS

### Registration—Louisiana

**In re Henry Earl PALMER, Registrar of the Parish of East Feliciana, Louisiana.**

United States District Court, Eastern District, Louisiana, July 18, 1960, No. 10 Sundry.  
United States Court of Appeals, Fifth Circuit, August 8, 1960, No. 18476.

**SUMMARY:** The Attorney General of the United States applied to a federal district court in Louisiana for an order pursuant to Section 305 of Title III of the Civil Rights Act of 1960 [5 Race Rel. L. Rep. 237 (1960)] to require the Registrar of Voters for the East Feliciana Parish, Louisiana, to produce records for inspection, reproduction, and copying. After a hearing, the court ordered the registrar to make available to the attorney general or his representatives for inspection, reproduction, and copying all records and papers in the registrar's control relative to registration or any other act requisite to voting in any election for federal office. Subsequently, the Court of Appeals for the Fifth Circuit denied a motion by defendant for a stay of proceedings pending appeal to the latter court.

## Order by District Court

The application of the Attorney General of the United States for order to require production of records for inspection, reproduction and copying came on for hearing before this court on a former day. This court, having heard the argument of counsel and having studied the briefs filed in support thereof, is now ready to rule.

IT IS ORDERED that, pursuant to the authority of Section 305 of Title III of the Civil Rights Act of 1960, Henry Earl Palmer, as the Registrar of Voters for the Parish of East Feliciana, make available to the Attorney General of the United States or his duly authorized representatives for purposes of inspection, reproduction and copying all records or papers in his possession, custody or control relating to any application, registration or other act requisite to voting in any general, special or primary election for federal office, and that such papers and records be made available at respondent's

principal office located in the Parish of East Feliciana at Clinton, Louisiana, beginning at 10:00 A.M. on Monday, August 8, 1960, and thereafter until inspection and copying are completed.

PER CURIAM: Whatever reservations some sincere people may have regarding desegregation in the public schools, no honest American can condone depriving a citizen of his right to vote. Congress, through Title III of the Civil Rights Act of 1960, has sought to protect this right. There can be no doubt that Title III is appropriate legislation under the Fifteenth Amendment of the Constitution. *Hannah v. Larche et al*, 363 U.S. —, decided 6/20/60; *United States v. Raines*, 362 U.S. 17; *United States v. McElveen*, 177 F.Supp. 355, affirmed, sub nom. *Thomas v. United States*, 362 U.S. 58; *United States v. Morton Salt Co.*, 338 U.S. 632, 641-643.

## Order in Court of Appeals

PER CURIAM: The Court having considered defendant's motion for a stay of proceedings in this cause pending his appeal to this Court, and having considered defendant's brief in support of the motion and the brief in opposition to

the motion filed on behalf of the United States of America, and it appearing to the Court that the defendant is not entitled to such a stay, it is ORDERED that the motion for a stay in this cause be and it is hereby DENIED.

## ELECTIONS

### Registration—New York

**Jose CAMACHO v. John DOE et al., Constituting the Board of Inspectors of Election.**

New York Supreme Court, Bronx County, Special Term, Part I, October 10, 1958, Index Number 11884/58

Court of Appeals of New York, November 19, 1959, 7 N.Y.2d 762, 194 N.Y.S.2d 33.

**SUMMARY:** A New York City resident, citizen of the United States by reason of Puerto Rican birth, brought a proceeding in a state supreme court against the election officials in his district to compel permission to take a voter registration literacy test in the Spanish language. Petitioner, who meets New York residence requirements for voting, alleged that, although literate in the Spanish language, he had been refused registration for past elections because he was unable to comply with provisions of the state constitution and election law requiring ability to read and write English as a qualification to vote in any election—federal, state, or municipal—held in the state. As a result thereof, petitioner contended that he (in com-

mon with more than 100,000 other Puerto Ricans in New York) was being denied the right to vote in violation of the equal protection clause of the Fourteenth Amendment and because of his race in violation of the Fifteenth Amendment. The court denied the petition, holding that petitioner, instead of being denied the right to vote, was only required first to learn to read and write English, and added: "This cannot be deemed an unreasonable requirement." The individual in question additionally filed a formal complaint with the United States Civil Rights Commission contending in part that language is as much an attribute of race as is color and that Spanish-speaking citizens denied the right to vote for such reason are entitled to relief under the Civil Rights Act. In its September 9, 1959, Report to the President and the Congress [4 Race Rel. L. Rep. 786 (1959)] the Commission took note of this complaint, stating that the case rests fundamentally upon the treaty between Spain and the United States ceding Puerto Rico to this country, which contains provisions to the effect that (1) the civil rights of the native inhabitants should be fixed by Congress (which subsequently gave them full American citizenship), but that (2) the inhabitants should have the choice of adopting English or retaining Spanish as their official language (which latter course they took). The New York trial court, however, had held that the treaty and federal statutory provisions do not "afford him any rights not enjoyed by other citizens." On appeal, the American Jewish Congress filed a brief *amicus curiae* because "There are a number of citizens of the Jewish faith who are completely literate in the Yiddish language, but are unable to read or write the English language," literacy in English not having been an absolute requirement for naturalization until 1950. The election officials argued that the literacy requirement is necessary to an understanding of campaign issues in an election, to which it was replied that New York had daily newspapers in both Spanish and Yiddish using the same news service as other papers, radio stations that carry public affairs programs in those languages, and candidates who campaign in those languages in the Puerto Rican and Jewish areas. Appellant also alleged that the literacy tests are not equally evaluated by those who administer it in the various districts, the relative strictness and laxity depending upon the attitude of local political leaders. The state Court of Appeals affirmed the lower court order without opinion. The opinion of the New York Supreme Court, the pertinent part of the Civil Rights Commission Report, and the memorandum decision of the New York Court of Appeals are reprinted below.

## Order in State Supreme Court

NATHAN, J.:

Motion for an order requiring the respondents Inspectors of Election in the Election District in which petitioner claims residence to permit him to prove his literacy, at his option, in English or Spanish, and to permit him to register, is denied. It is conceded that petitioner is a citizen of the United States by reason of his being a native of Puerto Rico.

The Constitution of the State of New York and its statutes require that in order to vote all persons, except for physical disability, must be

able to read and write English (N. Y. State Constitution Article 2 §1; N. Y. State Election Law §§150, 168 and 201). None of these provisions contravene the United States Constitution. The petitioner is not denied the right to vote. Under the laws of this State, however, he must first learn to read and write English. This cannot be deemed an unreasonable requirement.

The Court finds no merit in the claims of petitioner that the treaty and the United States statutes relied upon afford him any rights not enjoyed by other citizens.

## Report of the U. S. Commission on Civil Rights, 1959

Today, it is estimated some 618,000 American citizens who have migrated from the island Commonwealth of Puerto Rico live in New York

City.<sup>60</sup> About 190,000 of these people have lived

60. Commission's regional housing hearings, pp. 147-48, 152.

there long enough to satisfy the State's residence requirements for voting.<sup>61</sup> But many of them are not permitted to vote because they cannot pass the New York State literacy test which provides that "... no person shall become entitled to vote ... unless such person is also able, except for physical disability, to read and write English."<sup>62</sup>

Approximately 59 percent of the Puerto Rican residents of New York read and write only Spanish; they are served by three Spanish-language newspapers having a combined daily circulation of 82,000.<sup>63</sup> One such person, Jose Camacho, a resident of Bronx County, N.Y., filed a suit against the election officials in his home county seeking registration to vote; he also filed a formal complaint with the Commission on Civil Rights. Camacho's petition was denied by the Supreme Court of Bronx County, and at this writing was pending before the New York Court of Appeals.<sup>64</sup>

61. One year in the State, and 4 months in the county, city, or village, and 30 days in the election district, preceding the election, are required.

62. Constitution of the State of New York, art. II, sec. 1. This provision was inserted by a constitutional amendment effective Jan. 1, 1922.

63. From a recent survey, which also disclosed that 14 percent are literate in both Spanish and English, 14 percent in English alone, and the rest claim no reading habits even though the majority of them assert their literacy in Spanish.

64. Only one similar case in New York appears in the law reports; it was decided before the 1922 constitutional amendments and before the Congress granted American citizenship to inhabitants of Puerto Rico. In that case, too, a native of Puerto Rico sought to vote in New York. He had served with the U.S. Army of Occupation on the island, and had moved to New York in 1899; he claimed never to have declared allegiance to Spain, but to have "adopted" the nationality of the United States. The opinion in this case refers to both art. VI, sec. 3, and the fourteenth amendment of the Constitution of the United States. In denying the claim, reliance is put upon *Elk v. Wilkins*, 112 U.S. 94, which delineated the individual and collective methods of naturalization of citizens. Collective naturalization is "as by the force of a treaty by which foreign territory is acquired." The Court quotes from the Treaty of Paris, Dec. 10, 1898, by which Puerto Rico was ceded to the United States (sec. 9): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Con-

gress." The Court concluded: "As the Congress had not then acted to provide collective naturalization and as there was no claim of citizenship by reason of birth or individual naturalization, the petitioner was denied registration as a voter." *People ex rel. Juarbe v. Board of Inspectors*, 67 N.Y.S. 236 (Sup. Ct. 1900).

Camacho's contention is that denial of the right to vote because he and others similarly situated are not literate in the English language constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Fundamentally, his case rests upon provisions of the Treaty of Paris, by which war with Spain was concluded and Puerto Rico ceded to the United States. This treaty provided that the civil rights of the native inhabitants should be fixed by the Congress, but left to the inhabitants the choice of adopting English or retaining Spanish as their official language.<sup>65</sup> The Congress gave all inhabitants of Puerto Rico full American citizenship in 1917. The people chose Spanish as their language. But the United States Supreme Court has ruled that, "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."<sup>66</sup>

Unlike the other voting complaints, that of Mr. Camacho raises legal rather than factual issues, and Mr. Camacho has filed a counterpart case in the courts. This Commission regards the courts as the proper tribunals for determination of legal issues. However, this Commission has found that Puerto Rican-American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York.

65. It is interesting to note the bilingual character of many of the documents pertaining to the establishment of the Commonwealth of Puerto Rico—e.g., Resolutions 22 and 23, Constitutional Convention of Puerto Rico. *Laws of Puerto Rico*, Ann., pp. 129-131—and their approval in Public Law 447, 82d Cong., *ibid.*, pp. 132-134.

66. *Meyer v. State of Nebraska*, 262 U.S. 390, 401 (1923); compare *Farrington v. T. Tokushige*, 273 U.S. 284 (1927), where it is said, "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."

## New York Court of Appeals Opinion

Appeal from Supreme Court, Special Term, Bronx County.

Proceeding was brought against the Inspectors of Election in and for the 26th Election District

of the 6th Assembly District of the County of Bronx, and constituting the Board of Inspectors of Election of the 26th Election District to compel the Inspectors of Election to allow petitioner



to take a literacy test in the Spanish language, to register as a voter, and to vote.

Petitioner, who was a citizen of the United States by reason of his birth in Puerto Rico, and who had been a resident of the state for more than a year, and who had been a resident of New York City for four months, and who had been a resident of the election district for 30 days, alleged that he had been refused registration for past elections because he was not literate in the English language, though he was literate in the Spanish language. He claimed that he was thus being denied the right to vote in violation of the equal protection clause of the Fourteenth Amendment of the federal Constitution and because of his race in violation of the Fifteenth Amendment of the federal Constitution.

The Special Term, Edgar J. Nathan, Jr., J.,

entered an order on October 10, 1958 denying the petition, and the petitioner appealed to the Court of Appeals and made a motion in the Court of Appeals for leave to prosecute the appeal as a poor person.

The Court of Appeals, 5 N.Y.2d 938, 183 N.Y.S.2d 555, granted motion for leave to prosecute appeal as a poor person.

The Inspectors of Election contended in the Court of Appeals that distinction between literacy in English and literacy in another language was reasonable and did not violate the Fourteenth Amendment, and that the requirement of literacy in English did not violate the Fifteenth Amendment because it made no distinction based on race or color.

Order affirmed, without costs.

All concur.

## EMPLOYMENT

### Fair Employment Laws—Colorado

**The COLORADO ANTI-DISCRIMINATION COMMISSION, etc., and Marlon D. Green v. CONTINENTAL AIR LINES, INC.**

Supreme Court of Colorado, en banc, August 15, 1960, 355 P.2d 83.

**SUMMARY:** A Negro filed a complaint with the Colorado Anti-Discrimination Commission alleging that an airlines company had unlawfully discriminated against him by refusing to employ him as a pilot because of his race, although he was in all respects qualified for such employment. The commission found the company guilty of discriminatory and unfair employment practices under the Colorado Anti-Discrimination Act of 1957 [2 Race Rel. L. Rep. 697 (1957)] and ordered it to cease and desist from such practices and to give the complainant the first opportunity to enroll in its training school in the next course. On review by the district court of the City and County of Denver, the commission's order was held to be defective, having been signed only by the "coordinator;" and the cause was remanded to the commission to make certain fact findings after which the record was to be returned to the court. The commission thereafter upon its own motion withdrew its original findings of fact, conclusions of law, and orders, and entered new findings and orders, which it returned to the court. The court then held that, the original order being no longer in existence, the proceedings it had been called on to review were moot and that the new order was a nullity since it had been entered without notice to the parties and without a hearing. Treating the action of the district court as a judgment of dismissal, the state supreme court dismissed a writ of error brought by the company and the individual applicant and remanded the cause. It was held that the anti-discrimination act does not empower the commission of its own motion to vacate, amend, or in any manner enlarge upon an order to which review proceedings are directed, and that its attempt to vacate its original order in this case was void. It was also held that the district court would have to pass judgment upon the merits of the controversy before the supreme court could affirm or reverse. Three justices specially concurred in the result.

MOORE, Justice.

We will refer to plaintiff in error Marlon D. Green by name, and to all other plaintiffs in error as the Commission. Defendant in error will be referred to as Continental.

Green filed a complaint before the Commissioner in which he alleged that Continental unlawfully discriminated against him by reason of the fact that he is a Negro, and had refused to give him employment as an airplane pilot because of his race, notwithstanding that he was in all respects qualified for the employment he sought.

The Commission conducted extensive hearings pursuant to authority to do so as provided by C.R.S. 1953, 80-24-5 (6). At the conclusion of the hearings it entered "Findings of Fact, Conclusions of Law and Orders" in which Continental was found guilty of discriminatory and unfair employment practice in its requirement that in application forms the racial identity of an applicant for employment be shown and a photograph attached. The Commission found that Green was better qualified for the position than any applicant interviewed but was not hired because of his race. The Commission assumed the constitutionality of the Act; that it had jurisdiction to hear the complaint, and found there was a violation as charged by Green. It ordered Continental to cease and desist from the discriminatory and unfair employment practice; to give Green the first opportunity to enroll in its training school in the next course; and fixed Green's priority status as of June 24, 1957. Green was given until January 10, 1959 to indicate his willingness to enter the next pilot training course and this expression of willingness was duly filed by him. The record before us shows that the said order was signed by the "coordinator" of the Commission only and the seal of the Commission was affixed thereto.

*[District Court's Order]*

Continental then filed a petition in the district court of the City and County of Denver in which it sought judicial review of the Commission's order. The hearing in the district court was terminated by entry of the following order:

"It is ordered by the Court that the cause and Commission record be forthwith remanded to the Colorado Anti-Discrimination Commission; and

"It is further ordered by the Court that said Commission make findings of fact as to the Type and Nature of business that the Petitioner is engaged in; as to whether or not it is engaged in Inter State Commerce, and a finding by the Commission as to whether or not the Petitioner by virtue of that occupation and business is subject to the Anti-Discrimination Act; and also as to whether the job in question which Mr. Green applied for was a job that actually involved interstate operations.

"It is further ordered that upon making the additional findings, the Commission returned the record to this Court, and this Court will retain jurisdiction."

The Court also ruled that the Commission's order was defective in that it was signed by the coordinator only.

*[Commission's Order]*

Upon receipt of this remand from the district court the Commission entered an order which included the following:

"It is our understanding that the matter having been remanded to us by the Court, and particularly in view of the fact, as pointed out by the Court, that the purported original findings of fact and conclusions of law and orders of December 19, 1958, were signed by the Coordinator, and are to that extent defective, that it is therefore within the Commission's jurisdiction, and upon its own motion, it does hereby, withdraw its December 19, 1959, findings of fact, conclusions of law and orders."

Without further notice to the parties, or hearing of any kind, the Commission entered new findings and new orders consisting of nineteen type-written pages, whereas the original document consisted of only five pages. As thus enlarged the record went back to the district court where it was held that the order of the Commission to which the proceedings for review had been instituted, having been withdrawn by the Commission, was no longer in existence, and that the questions raised by the proceedings in the district court were moot. The court held that the enlarged nineteen page order of the Commission was a nullity since it had been entered without notice to the parties and without a hearing.

The record before us does not disclose that any judgment of dismissal was entered. It does, however, contain a statement by the trial judge that: "The Court will dispense with a motion for new trial and grant any aggrieved party 30 days to take such proper proceedings on appeal as they may care to." Whatever might have been intended, the trial court did not enter a final judgment which, except for stated exceptions, is essential to a review on writ of error. We might well dismiss this writ of error but to do so would only cause embarrassment and further delay. For the reason that the cause must be remanded for further consideration by the trial court we treat the matter as though a judgment of dismissal had actually been entered since it is quite apparent that the trial court intended to accomplish that result.

#### QUESTION TO BE DETERMINED

*Where a hearing has been had before the Anti-Discrimination Commission and a final order has been entered; and where a party to those proceedings seeks review by the district court as provided by statute; does the Commission thereafter have jurisdiction, of its own motion, to vacate, alter, amend or in any manner enlarge upon the order to which the proceedings on review are directed?*

The question is answered in the negative. The pertinent portion of the statute (C.R.S. '53, 80-24-8 (3)) provides that when the petition for review is filed:

"\* \* \* The Court shall have jurisdiction of the proceeding and the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified, or setting aside the order of the commission, in whole or in part."

Subsection (7) of the same statute provides:

"The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review by the supreme court as provided by law".

It is clear that the above quoted language is controlling and requires the negative an-

swer to the question. Even in the absence of the language of the statute this court has repeatedly held that an administrative agency is without authority to change, alter or vacate an order while review proceedings are pending in the district court, even as an inferior court is without authority to vacate or modify a judgment after writ of error has issued out of this court directed to such judgment. We direct attention to the following cases in this connection: *Denver & Salt Lake Railroad Company v. Chicago, Burlington & Quincy Railroad Co. et al.*, 67 Colo. 155, 185 Pac. 817; *Morgan v. U. S.* 304 U. S. 1, 58 S. Ct., 773, 82 L. Ed. 1129; *Mantor v. Industrial Commission et al.*, 89 Colo. 90, 299 Pac. 11; *Davidson Chevrolet Inc. et al., v. City and County of Denver et al.*, 137 Colo. 575, 328 P. (2d) 377; *Brooke v. People*, 139 Colo. 338, 339 P. (2d) 993.

It follows that the attempt of the Commission to vacate its original order was void. That order is the only one which was properly before the district court for adjudication concerning its validity. The district court has not passed upon that issue but remanded the cause to the Commission with directions to make specific findings on specific issues. The Commission failed to comply with this order. It had no jurisdiction to do other than as directed by the trial court which should require performance of its order if for any reason it cannot take judicial notice of the facts upon which it asked for the entry of findings. In any event the district court must pass judgment upon the merits of the controversy, and until such judgment is entered there is nothing before us to affirm or reverse.

The writ of error is dismissed and the cause remanded with directions for further proceedings in conformity with the views expressed herein.

MR. CHIEF JUSTICE SUTTON, MR. JUSTICE FRANTZ AND MR. JUSTICE DOYLE specially concur in the result.

#### Concurring Opinion

MR. JUSTICE DOYLE, *specially concurring*:

I agree with that part of the majority opinion which reverses the judgment of the trial court and I also agree with the majority's view that the original order of the Commission was not

invalidated by the remand of the district court and by the Commission's attempted substitution of new findings. Being of the opinion, however, that this Court has jurisdiction to decide the important issues and that it should do so now rather than to await a further trial and a further judgment of the trial court, I dissent from that part of the opinion which orders the district court to conduct a hearing and determine the issues. In order to provide a better understanding of the legal questions before us, it is necessary to set forth the important facts giving rise to the controversy.

The case arises under the Colorado Anti-Discrimination Act of 1957, C. R. S. '53, 80-24-1. The complainant Marlon Green applied to Continental Air Lines, Inc. for employment as a commercial air line pilot. His application was denied notwithstanding that he satisfied every qualifying standard. This denial occurred after Green had filed a complaint before the Michigan Anti-Discrimination Commission and also complained to the President's Commission. He filed the present complaint following notification that his application had been passed over.

#### *[Facts Reviewed]*

The facts are that Green, while still serving as a Captain in the United States Air Force, sent letters of application to the major air lines in the United States. Following his discharge from the service on May 8, 1957, he made further applications in person, by mail and by telephone. Among these was an application to Continental Air Lines on April 27, 1957. At this very same time, Continental was seeking approximately fourteen pilots.

On June 19, 1957, Continental called Green for an interview, but at this time it did not know he was a Negro. Both the application form which Green filled out in Denver when he had his interview and the one he mailed previously had blank spaces to be filled in with the race of the applicant. Green was asked by the interviewer in Denver to fill in the blank which he had left unfilled. In addition, a photograph of the applicant was required, which was not furnished. Green met the age and physical requirements and had many more flight hours, including multi-engine experience, than were required for the job, and more than any other applicant. Continental's vice president in charge of personnel, Mr. Bell, testified at the hearing before the Commission that Green's general qualifications

were satisfactory. Of the fourteen applicants interviewed by Continental in July only six, including Green, were found to be qualified. Four of these were taken into the training class. One was taken into a later class. Of the six found to be qualified only Green was not ultimately employed.

A telegram was sent to Green on July 8, 1957 informing him that he had not been selected for the July training class; he did not receive this telegram but was given the same information by Mr. Bell in a telephone conversation. At that time Bell told him that he was still on the eligible list as a qualified pilot. At the hearing, the explanation of Continental as to why Green was passed over was that they did not need six pilots that month and that their selection from among those found to be qualified was made in a "haphazard" way and was not based on a determination of who among the group were the best qualified. Continental offered no clear explanation of who actually made this haphazard determination. In August and September Continental hired seventeen additional pilots. Bell testified at the hearing that Green's name was held in the eligible file and that only when Continental learned that Green's name had been in an Albuquerque, New Mexico newspaper story which disclosed the fact that Green had filed complaints with the Michigan Fair Employment Practices Commission and the President's Committee on Government Contracts was Green's name withdrawn from the eligible file. The newspaper article is dated one day after Green's letter of complaint to the Colorado Anti-Discrimination Commission on August 3, 1957. Bell testified that it was Continental's policy to reject any applicant to whom notoriety had attached.

Efforts at conciliation were begun soon after the filing of the complaint and extended over many months. These efforts were unsuccessful and a full hearing on the complaint was finally held on May 7, 1958. The Commission did not issue its findings of fact and conclusions of law until December 18, 1958. Prior to this time Green had informed the Commission of his desire to withdraw his complaint.

#### *[Commission's Conclusions]*

After reciting the facts set forth above, the Commission concluded that Continental was guilty of a discriminatory employment practice, as defined in regulations adopted under the act, in its requirement of a photograph of the appli-



cant and a designation of his race on the application form. The Commission found that Green was better qualified than any applicant for the position and that he was denied employment "because of the discriminatory act of Respondent". It also found that the evidence did not show that Continental used extreme care in the selection among applicants for pilot positions. It pointed out that Continental could not make clear through its witnesses "who was charged with the selection of the successful applicants". It found that the evidence conclusively established that the only reason that "the complainant was not selected for training school . . . because of his race".

In its order, the Commission noted that Green had requested that his complaint be withdrawn, that under the rules of the Commission the vote of a majority of the commissioners was necessary before a complaint could be withdrawn after the case was noted for hearing, and that since the required majority vote was not obtained the complaint could not be withdrawn.

Continental was ordered to cease and desist from such discriminatory employment practice, to give Green the first opportunity to enroll in its school in its next course, and to give him priority status as of June 24, 1957. Green was directed to advise the Commission whether he was willing to enter the next training class. The Commission specifically retained jurisdiction.

Continental sought review of the order in the district court. The case came before the court on June 11, 1959, but before any hearing was had the trial judge on his own motion remanded the cause to the Commission for the purpose of making findings with regard to (1) the type and nature of the business that Continental Air Lines is engaged in, (2) whether Continental Air Lines is engaged in interstate commerce, (3) whether by virtue of that business Continental is subject to the Anti-Discrimination Act, and (4) whether the job in question was one that actually involved interstate operations. It should be noted that the Commission order had stated "The respondent is a duly authorized and certificated commercial carrier by air and maintains an office at Stapleton Airfield, Denver, Colorado." The trial court did not at this point, (or at any time thereafter) pass on the contentions made in Continental's complaint and petition for review. The complaint contained six claims:

First, that the Commission was without jurisdiction over the subject matter; Second, that the

statute, if applied to an interstate carrier by air such as Continental, is unconstitutional; Third, that the findings of the Commission are not supported by substantial evidence and that the Commission erred in receiving in evidence statements made by agents of Continental during settlement conferences; Fourth, that Green's attempt to withdraw his complaint deprived the Commission of jurisdiction to proceed further and that the Commission had no power to adopt its regulation relating to withdrawal of complaints; Fifth, that the absence of the full Commission from the hearing of May 7, 1958 rendered its decision invalid and that there is no showing that members present made the findings submitted; and Sixth, that the findings and conclusions of the Commission are void and unenforceable because of their vagueness and uncertainty.

#### *[Commission's Action on Remand]*

On the remand the Commission did not limit itself to supplementing the findings with findings requested by the trial court, but instead withdrew its first order and on June 19, 1959 issued its second order which was longer and more detailed than the first. This second order dealt largely with the constitutional issues but included a thorough resume of the evidence and findings regarding discrimination, which were virtually the same as the findings in the first order. The second order was also objected to and a hearing held on these objections by Judge Black on June 25, 1959. The court concluded that both the first and the second order were invalid and that there was nothing before it to review. As to the first order, the court said that the fact that the Commission had withdrawn it, meant that it had no further legal effect. As to the second order, the court held that since it had been issued without a hearing it was also invalid.

The contention of the complainant Green is that the trial court erred in remanding the first order to the Commission for findings relating to interstate commerce and in not passing on the merits of the order for the reason that it was irrelevant to the question of the jurisdiction of the Commission or the constitutionality of the Anti-Discrimination Act—whether Continental was engaged in interstate commerce. That the court erred in not considering the first order on its merits. As to the hearing on the second order, Green contends that the court erred in not con-

sidering his motion to strike; that it was error to find the second order a nullity because no hearing was granted.

It is apparent from the recitation of the above facts and discussion of the proceedings had that the delays in processing this complaint have been such as to threaten in and of themselves to deprive the complainant of a remedy. To paraphrase a familiar axiom, this is a situation in which justice delayed results in justice being denied. It seems to me that the complainant is entitled to have his case decided either favorably or unfavorably and that he should not be subject to another long delay incident to a retrial of the merits and a review in this Court of a judgment therefrom entered, unless such additional proceedings are absolutely necessary.

[Should Decide Case Now]

Since all of the evidence in the case has been adduced and all of the issues in the case have been framed, it seems to me that this Court can and should take the responsibility of deciding the cause now rather than postponing a final decision for an indefinite time while the judicial machinery gets around to a new trial and then returns the matter here for review. The question is whether a compelling legal reason requires these further legal steps. The majority opinion points out that the statute vests exclusive jurisdiction in the district court to review the order of the Commission (C.R.S. '53, 80-24-8 (7)). However, the statute was not written in contemplation of proceedings such as the present ones. Normally it would be proper and legal for the district court, to the exclusion of other courts, to review the proceedings before the Commission and thereafter we would review the action of the district court with reference to the Commission's order. The matter for decision before the district court and before this Court would be identical. *First*, there would be the question of jurisdiction of the Commission, and *secondly*, the question of whether the findings of the Commission are supported by substantial evidence. Since this Court will finally have to come to grips with these questions, it seems to me pointless to postpone the day of decision by sending it back to the trial court for a preliminary determination when it is within our power to now perform the identical function which we will be required to perform in the future. What contribution will be made by a preliminary trial court ruling which is in no way binding on us?

I do not ordinarily approve of legal short cuts, but this case has been before the trial court twice and on each occasion that court has failed to decide the merits. Moreover, the trial court has no fact finding function here.

In other cases involving administrative decisions, this Court has not hesitated to go to the heart of the controversy and decide the case on its merits even though strict observance of orderly administrative procedure required remand of the case for further determination or further hearing. For example, in *Linder v. Copeland* 137 Colo. 53, 320 P.2d 972, a case involving the Colorado State Board of Examiners of Architects, it was concluded that the findings of the Board were inadequate and for that reason could not be reviewed. At the same time the Court found that there was no evidence in the record which supported the Board's conclusion. In view of this the Court entertained jurisdiction of the case, held that the record was devoid of evidence, directed that the Board's denial of an application be vacated and directed the Board to issue a license to the applicant. It was there observed:

"When, as here, a court is called upon to review the action of an administrative agency, it should be placed in the same position as the agency. \* \* \*

The case of *Geer v. Stathopoulos*, 135 Colo. 146, 309 P. 2d 606 was relied on in the *Linder* case. In the *Stathopoulos* case, the Court concluded that the plaintiff in error had not had a fair trial. Nevertheless, the court reviewed the case as though it had not been before the trial court and used the following pertinent language:

"The review of the Manager's action denying the application for a liquor license, came before the trial judge on a printed record—the identical record before this court. Hence, there is no difference as to what is being reviewed, between the trial court and this court. In other words, this court 'will examine the record as though the matter had never been heard or examined by the trial court, and will exercise its discretion in the matter as a trial court is authorized to do in such matters'. *Bolse Flying Service v. General Motors Accept. Corp.*, 55 Ida. 5, 36 P. (2d) 813. Thus, the question initially forming the subject of this controversy will be fairly and impartially reviewed here, and there is no need for this

court to go into the question of the disqualification of the trial judge.

"We are not concerned with the rule ordinarily applicable to writs of error before this court—that we must approach the facts of a case by constantly keeping in mind the exclusive vantage point of the trial judge in that he was able in the trial to use his eyes, ears and intelligence to discern wherein was truth, and wherein credit and weight should be given to the testimony of witnesses. Such is not required in this case. The rule is well stated in *Miller v. Taylor*, 6 Colo. 41, as 'The testimony in this case was taken before a referee, and the rule that a decree or judgment will not be disturbed unless manifestly against the weight of evidence does not obtain. \* \* \*'

Still another example involving the decision on its merits by this Court of a controversy which originated before an administrative tribunal is that of *McNertney v. Colorado State Board of Examiners of Architects*, 139 Colo. 554, 342 P. 2d 633. See also *State Civil Service Commission v. Conklin*, 138 Colo. 528, 335 P. 2d 537, wherein the Court concluded that the findings of the Civil Service Commission were insufficient (even though the evidence might have been sufficient to justify the conclusion reached). Here the mandate was that the judgment of the trial court voiding the proceedings before the Commission should be affirmed.

#### [Precedents for Speedy Decision]

It is thus apparent that in recent decisions this Court has not hesitated to determine the merits of an administrative matter notwithstanding that the proceedings before the administrative tribunal or the trial court were inadequate. Consequently, I cannot see why strict procedural nicety should be observed in the present case wherein substantial justice demands a speedy decision upholding the Commission or reversing it.

Every question which has been raised here is a question of law. See *Radks v. Union Pacific R. R. Co.*, 138 Colo. 189, 195, 334 P. 2d 1077. No finding of the Commission was necessary with respect to whether Continental Air Lines is subject to the jurisdiction of the Commission. This was a question of law which the court should have determined from the undisputed facts in the record. The same is true of the

other issue on which the trial court demanded a finding, that is, the question of whether Continental Air Lines was engaged in inter-state commerce. It seems to me that this question is one subject to judicial notice, *Rush v. Thompson*, 356 Mo. 568, 202 S.W. 2d 800, and that the conclusion that this company is engaged in inter-state commerce is clear beyond doubt. A finding on this question is not necessary and if it were made would be superfluous. Any decision concerning jurisdiction should be therefore premised upon the fact that Continental is so engaged.

I have examined the arguments of Continental going to the proposition that the controversy was outside the jurisdiction of the Commission, and I disagree with them. The sweep and scope of the language of the Anti-Discrimination Act makes it clear that its purpose is not limited to intrastate matters. C.R.S. '53, 80-24-2 (5). I am aware of no federal constitutional objection to this assertion of state power. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U. S. (12 How.) 299; *Railway Mail Ass'n. v. Corsi*, 326 U. S. 88. From a reading of the pertinent Federal statutes, e.g., 45 U.S.C. Sec. 151 *et seq*; 49 U.S.C. Sec. 401 *et seq*; and the related decisions, I am convinced that the application of the present statute to an interstate carrier does not conflict with the national commerce power. It cannot be said that the federal government has expressly or by implication preempted this particular field. In fact, no federal statute deals with employment discrimination by interstate carriers. Consequently, the state is not deprived of jurisdiction by reason of the nature of the regulation or by reason of federal preemption. Cf. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P. 2d 903.

#### [Sole Question for Determination]

I am convinced that the sole question for determination in this case is whether there is substantial evidence in the record to support the findings and order of the Commission. C.R.S. '53, 80-24-8 (6). I am also convinced that under the facts here presented we should make this determination—that we should not postpone action until there has been a preliminary decision by the trial court.

Is there evidence in the record which furnishes a substantial basis for the finding of the Commission that Continental refused to employ

complainant because of his race? In answering this, it should be noted that discrimination such like intent and motive, is difficult to prove. It requires motivation analysis and circumstantial evidence is the usual method of proof. It should also be noted that the Commission is made up of persons who are expert in this field.

The basic facts which give rise to the inferences which were drawn by the Commission are these: Continental required complainant to disclose his race in the application blank furnished to him. This would indicate the significance of this factor to Continental. The fact that Green was one of six of a group of fourteen found to be qualified and that Green was the only one of the six to be excluded is also important. This coupled with the fact that Green was admittedly qualified would indicate that he was rejected only because of his race. When these facts are related to the fact that two months later 17 new applicants were enrolled in a training class, the testimony of Continental that they needed only four in July when they rejected Green is questionable. Continental failed to come forward with an explanation for the rejection of Green other than the publicity incident to his complaint in Michigan. This reason does not justify their action in these circumstances. To hold it sufficient would mean that the applicant would be precluded from exercising his legal rights while being effectively stymied by delays in acting on his application. This would create an impossible dilemma for the applicant. The finding of the Commission supported by evidence that Green was the best qualified of the applicants is another meaningful fact.

One cannot read the record without being impressed that this complainant had extraordinary qualifications. He appears as a very well trained individual and also as a well adjusted, highly intelligent person. There is no trace of bitterness nor of an attitude of dramatics. The reader gets the impression that Green was not filling a role or serving as an instrument in a test case, but on the contrary the conclusion is inescapable that he pursued this remedy with a high degree of good faith.

#### [Evidence Supports Commission's Findings]

In view of the study of the facts, a conclusion is inescapable that there is ample evidence to support the Commission's findings and that in fact there is a dearth of evidence to support a contrary finding.

In fairness to Continental, it should be pointed out that although they are shown to have discriminated the record does not indicate that they did so out of any attitude or viewpoint of personal animosity or prejudice. One gets the impression that perhaps Green was rejected with reluctance and in response to outside pressures. One of the Continental officials spoke frankly to Green concerning the practical concerns entertained by them in connection with employing him.

In conclusion, it should be mentioned that cases like the present one are very rare. This type of matter is normally handled by conciliation and settlement and seldom reaches the litigation stage. It is pointed out in a note in 68 Harv. L. Rev. 685 entitled *The Operation of State Fair Employment Practices Commissions* that as of 1955 only 8 of 6,000 complaints reached the hearing stage. The fact that this is the first case of its kind to come before this Court attests to the fact that the persons responsible for enforcement of this act are fully aware that conciliation and settlement is better adapted to the disposition of such cases than is litigation.

I am of the opinion that the original findings of the Commission were sufficient and valid, and that the remand of the trial court did not have the effect of invalidating them. It is also my opinion that the Commission had jurisdiction and that it exercised its power properly. The evidence was amply sufficient to support the findings. The case should be, therefore, remanded to the trial court with directions to enter a judgment affirming the orders of the Commission.

I am authorized to say that Mr. Chief Justice Sutton and Mr. Justice Frantz join in this specially concurring opinion.



## EMPLOYMENT

### Discriminatory Practices—Kentucky

James Edward JONES et al. v. DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS INTERNATIONAL UNION OF AMERICA et al.

United States District Court, Western District, Kentucky, July 21, 1960, No. 3984.

**SUMMARY:** Nine Negro employees of a distillery in Louisville, Kentucky, brought an action in federal district court against the distillery, a national distillery workers union, and a local of the national union, alleging that an agreement between the distillery and the union restricted plaintiffs and other non-white employees of the distillery to sanitation department jobs, permitted the setting up of separate seniority lists for Negro and white employees, and thereby violated the rights of Negro workers and cut down their earning ability. Damages in the amount of \$250,000 were asked. Subsequently, the court, upon being advised that the parties had settled the matters sought to be litigated as evidenced by a supplemental agreement of July 5, 1960, and a clarification statement of July 7, 1960, granted plaintiffs' motion for a voluntary nonsuit, dismissing the cause without prejudice. The supplemental agreement and the clarification statement, embodying terms whereby the seniority lists would be completely "melded" and other reforms would be taken by January 1, 1961, and the court's order of dismissal are set out below.

CLARIFICATION STATEMENT TO THE ATTACHED SUPPLEMENTAL AGREEMENT ENTERED INTO THE 5TH DAY OF JULY, 1960, BY AND BETWEEN JULIUS KESSLER DISTILLING CO., INC., LOUISVILLE, KENTUCKY (INCLUDING THE JEFFERSONVILLE, INDIANA OPERATION) AND THE DISTILLERY, RECTIFYING, WINE, AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, LOCAL 16, AFL-CIO:

After a thorough discussion of the ten paragraphs as set out in the Supplemental Agreement, at a meeting held at the offices of Herbert L. Segal, Attorney, Louisville, Kentucky on the 7th day of July, 1960 between a Committee representing the Sanitors, the Sanitors' Attorney, James Crumlin, a Committee representing Local 16, International Representative John McKiernan, and Herbert L. Segal, Attorney for Local 16, the following clarification statement was agreed by Local 16 to be attached to the said Supplemental Agreement.

Each and every paragraphed item, 1-10, was read and thoroughly discussed.

1) Paragraph 1 of the Supplemental Agreement is hereby understood to mean and clarified as follows:

All sanitresses will remain as they are under the present contract. [They won't bump or be bumped by anyone, as long as they have seniority to work. They will be put on the male seniority list in their proper chronological order. They can be laid off by plant seniority.]

2) as to Paragraphs 2, 3, 4, 5 and 6, after a full discussion, it was felt that no clarification language as to intent was necessary.

3) Paragraph 7 is hereby understood to mean and clarified as follows:

Sanitors will not use the once a year transfers for a mass movement into general helpers jobs. They will continue to use once a year transfers only within Sanitation as is the present practice. As a matter of clarification, for example: If there is a need by the Company for any more general helpers, the Company will post in the Sanitation Department the required number of general helpers needed. Assuming the Sanitors will take the jobs, the Sanitors will be given the jobs based on their plant seniority.

Those vacancies created by the Sanitors leaving their respective jobs will be filled by calling in the senior Sanitors laid off.

4) As to Paragraph 8, after a full discussion, it was felt that no clarification language as to intent was necessary.

5) Paragraph 9. Over and above all these previously mentioned items, it is agreed:

a) The Sanitors on layoff who have worked since 8/1/56 will not expect to be brought in to replace junior General Helpers on the date of Agreement but will await recall by agreed procedure.

As a matter of clarification, for example: After January 1, 1961, when the seniority lists are melded, the recalls will be by

strict plant seniority irrespective of the departments the Sanitors are needed in.

b) From date of agreement to 1/1/61 those Sanitors on lay off and who have worked since 8/1/56 and who are called in to work will be recalled only to Sanitation. And—during this period from agreement to 1/1/61 all Sanitors taking temporary jobs as well as their temporary replacements called into Sanitation will when no longer needed in these temporary jobs return to their last previous position including lay off.

c) After 1/1/61 the seniority lists will be completely melded and the procedures followed as set forth in the various steps previously explained.

6) As to paragraph 10, after a full discussion, it was felt that no clarification language as to intent was necessary.

#### SUPPLEMENTAL AGREEMENT

This SUPPLEMENTAL AGREEMENT entered into the 5th day of July, 1960, as by and between Julius Kessler Distilling Co., Inc., Louisville, Kentucky (including the Jeffersonville, Indiana operation) and the Distillery, Rectifying, Wine and Allied Workers' International Union of America's affiliated Local No. 16.

It is hereby understood and agreed by the parties whose signatures appear below, that the following upon signing, shall become a Supplement to the existing Agreement.

1. All Sanitresses will remain as they are under the present contract. (They won't bump or be bumped by anyone. They can be laid off by plant seniority).

2. Remove from the seniority list the 13 Sanitors and 5 colored Sanitresses in Sanitation who have not worked since August 1, 1956.

3. As of date agreement is reached relative to this matter place Sanitors now working on general seniority list in their proper chronological order. This is what we refer to as melding the seniority of the present dual seniority lists.

4. From agreement date onward Sanitors may bid for any vacancies by seniority and ability according to the contract provisions.

5. All lay-offs shall be by plant seniority from the new melded male seniority list.

6. All recalls shall be made by plant seniority from the new melded male seniority list.

7. The Sanitors will not use the once a year transfers for a mass movement into General

Helper jobs. They will continue to use once a year transfers only within Sanitation as is the present practice.

8. It is understood that Sanitors must become a General Helper before they can bid for key jobs, Operators Jobs, etc. The same procedures will apply to all General Helpers, regardless of color, as now apply to General Helpers.

9. Over and above all these previously mentioned items it is agreed—

a. The Sanitors on lay off who have worked since 8/1/56 will not expect to be brought in to replace junior General Helpers on the date of agreement but will await recall by agreed procedure.

b. From date of agreement to 1/1/61 those Sanitors on lay off and who have worked since 8/1/56 and who are called in to work will be recalled only to Sanitation. And—during this period from agreement to 1/1/61 all Sanitors taking temporary jobs as well as their temporary replacements called into Sanitation will when no longer needed in these temporary jobs return to their last previous position including lay off.

c. After 1/1/61 the seniority lists will be completely melded and the procedures followed as set forth in the various steps previously explained.

10. The Company shall replace every Sanitor leaving Sanitation by bid or other opening or vacancy by recalling a laid off Sanitor. This does not apply to vacation replacements.

#### MOTION FOR VOLUNTARY DISMISSAL

Plaintiffs move the Court pursuant to Rules 41(a)(2) and 23(c) of the Federal Rules of Civil Procedure for an Order dismissing this class action, which was brought pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure, without prejudice, on the following grounds:

1. That the defendants have not filed any answer or responsive pleading, and have not pleaded any counterclaim against the plaintiffs;
2. That such dismissal will not inconvenience or prejudice the defendants;
3. That subsequent to the filing of this action the parties have conducted negotiations with a view to amicable settle-

ment of the matter sought to be litigated in the action. On July 5, 1960, as a result of these negotiations a "Supplemental Agreement" (a copy of which is appended hereto) was entered into between the defendant, Julius Kessler Distillery Co., Inc., and the defendant, Local No. 16, of the Distillery, Rectifying, Wine and Allied Workers International Union of America. Thereafter on or about July 7, 1960, a "Clarification Statement" (a copy of which is appended hereto) explaining portions of the "Supplemental Agreement" was agreed to and adopted by the same parties.

4. The aforesaid "Supplemental Agreement" and "Clarification Statement" deal with the rights of the plaintiffs involved in this action and constitute a representation to the plaintiffs and the class they represent that the matters of which they complain herein and for which they seek relief in this Court will be amicably

resolved without the necessity for further prosecution of this cause, and relying thereupon, the plaintiffs request that the cause be dismissed.

#### ORDER OF DISMISSAL

This cause came on to be heard on plaintiffs' motion for a voluntary dismissal of said cause pursuant to Rules 41(a)(2) and 23(c) of the Federal Rules of Civil Procedure, and this motion having been seen and notice waived by the defendants, and the Court being fully advised as to the agreement and representations by the parties for settlement of the matters sought to be litigated in this cause as they are reflected in the documents called the "Supplemental Agreement" and the "Clarification Statement" appended to the Motion for Voluntary Dismissal;

IT IS ORDERED that this cause be and the same hereby is dismissed without prejudice.

### GOVERNMENTAL ACTION Non-Discrimination—Oregon

Rowan M. WILEY et ux. v. RICHLAND WATER DISTRICT et al., etc.

United States District Court, District of Oregon, June 30, 1960, No. C 60-207.

**SUMMARY:** Plaintiffs bought property within the limits of defendant water district and several months later began construction of a residence. The neighbors, then becoming aware that plaintiffs were Negroes, circulated a petition protesting their entry into the community. Two gatherings were held in the neighborhood for the purpose of deciding on action to keep plaintiffs from settling there. An official of the water district attended one meeting, and subsequently the district commissioners were called into extraordinary session for the announced purpose of considering "color and water." At the session, a resolution was adopted to acquire plaintiffs' lot, and a condemnation suit was filed. Plaintiffs then filed an action in United States District Court to enjoin the condemnation. The district court found that it had jurisdiction under the civil rights statutes, and issued the injunction. It ruled that the primary motive for the condemnation proceeding was not for a lawful use of the district, but rather was to discriminate against plaintiffs because of their race or color, thereby depriving them of their rights as citizens of the state and nation.

EAST, District Judge.

This matter came on for trial upon the 13th day of June, 1960, before the Honorable William G. East, United States District Judge for

the District of Oregon, upon the segregated issue of whether the actions of defendants in taking steps to condemn and take possession of plaintiffs' property were unlawful.

Plaintiffs appeared in person and by their attorneys, Don S. Willner, Lenon & Willner, and Paul R. Meyer, and defendants appeared in person and by their attorney, Harold E. Burke. The Court having considered the sworn testimony of the witnesses and the exhibits and the oral argument of counsel and being fully advised in the premises now enters:

#### FINDINGS OF FACT

1. Plaintiffs and all individual defendants are citizens, residents and inhabitants of the United States, the State of Oregon and this judicial district. The defendant corporation is a public corporation existing under and by virtue of the laws of the State of Oregon with its principal place of business in this judicial district.

2. The defendant Richland Water District is a political subdivision of the State of Oregon organized pursuant to the act of the Legislature of the State to carry on a public use, namely: in obtaining for the inhabitants within its geographical boundaries, or outside if it be permitted under its charter, a supply of water for domestic use.

3. On March 2, 1960, and at all times thereafter, the individual defendants were the duly qualified and acting board of directors of the defendant corporation.

4. Plaintiffs are of the Negro race.

5. In September 1959 plaintiffs purchased real property within the boundaries of defendant corporation at 1636 N.E. 140th Avenue, Portland, Oregon, and in February 1960 commenced to construct a residence. On or about February 20, 1960, plaintiff Rowan M. Wiley visited the premises, which visit was noticed by neighbors and was the first indication to the residents in the area that the owners of said property were Negro.

6. Shortly thereafter there was circulated a petition within the inhabitants of the District to the effect, "We do not want these colored people in our society."

7. These activities in the neighborhood continued to the point where there became two gatherings of the society, some thirty or forty people, each avowed for the one purpose of determining what they would do to prevent these colored people from becoming members of their society and owning property within their area. The first gathering was on or about February 23, 1960, and the second gathering was on February 28, 1960.

8. The Superintendent of the Richland Water District attended the second of these meetings in the neighborhood which meeting had the purpose stated in the preceding paragraph. The Superintendent did secure sufficient information that he thought it advisable, along with some other information that he had to call a special meeting of the Board, not to wait until its regular March meeting.

9. The Superintendent of the defendant water district advised the commissioners at the special meeting of March 2, 1960, that they had two problems: "color and water."

10. On March 2, 1960, at a special meeting of the Richland Water District, the following resolution was unanimously adopted:

"Based on the prior policy of the Richland Water District for preservation of sufficient land for future development and sanitation control, based further on the past experience of the District, that Richland Water District purchase tax lot 62-86, the northerly 50 feet of tax lot 26-15 of Richland for the price determined by competent appraisal, and in the event the purchase cannot be made, then the Water Board institute condemnation proceedings to secure the property."

There is no evidence that this was an extended meeting.

11. Pursuant to said resolution Richland Water District has instituted its suit in the Circuit Court of the State of Oregon for the County of Multnomah to condemn the real property of plaintiffs located at 1636 N.E. 140th Avenue, Portland, Oregon.

12. With reference to the concern of the Richland Water District over future needs of water, they had made inquiry and they had committees appointed to make investigations concerning the acquisition of various parcels. There is no testimony that they were ever in any wise interested in the instant property as a site for water supply prior to March 2, 1960. At the trial the defendants, through their testimony, practically abandoned the theory of a reasonable need of the subject property for future supply of water and base the necessity behind their resolution of taking upon "sanitation control."

13. That at the time of the discussion and adoption of said resolution the defendant directors were not only charged with the notice



of, but did have actual notice of, the requirements of the laws of the State of Oregon and the directives of the State Board of Health as to types of sewage disposal systems allowable within the District's area and tolerable distances of private disposal systems from existing wells.

14. That at no time prior to the adoption of their resolution aforesaid did the defendant directors concern themselves as to the plans and specifications of the structure to be erected by plaintiffs, the location of the sewage disposal system, or make any inquiries as to whether or not the structure with its sanitation system would be violative of state law and that at the moment of the adoption of said resolution the defendants had no information whatsoever as to the type of plaintiffs' structure or of the facilities or location of sewage disposal. The plans and specifications for the structure to be erected by plaintiffs and its sewage disposal system, as interpreted and modified by the officers of the Multnomah County agency in charge of the enforcement of building and code restrictions in said County and of the law of the State of Oregon concerning residential sewage disposal systems provide for and are in full and complete compliance with existing law and regulation covering the installation and maintenance of the sewage disposal system for plaintiffs' structure. There was no action taken by defendants or any negotiations by the defendants with the owners or with the contractor to determine the type of structure or the facilities of sewage disposal.

15. Since the building of this property under its present standards and the location of the sewage disposal must be made under state law, all state law standards must be met. The commissioners could have found that out upon the least bit of investigation.

16. The primary motive and reason for the adoption of the resolution was not for a lawful use of the District, but was motivated with the desire to deprive the plaintiffs of the use of the enjoyment of the land which they purchased because of the fact that they were of the Negro race.

17. That the individual defendant directors did conspire together, act jointly and in concert to use their office and said resolution under color of state law and authority with the intent of discrimination against the plaintiffs on account of their race or color.

18. The defendant directors, acting for and

on behalf of the defendant Water District, and other persons, acting for and on behalf of said Water District, have subjected the plaintiffs and threatened to subject plaintiffs to further deprivation of plaintiffs' rights and privileges as citizens of the United States and of the State of Oregon and to further deprivation of equal protection of the law, and, particularly, to deprive plaintiffs of their lawful use and enjoyment of their real property aforesaid and to own a home and live within the area of the defendant Richland Water District, all by and through the proceedings of condemnation now pending in the Circuit Court of the State of Oregon aforesaid.

### CONCLUSIONS OF LAW

This Court has jurisdiction of the subject matter and of the parties based upon 28 U.S.C.A. Section 1343 and particularly subsection 3 thereof which reads:

"The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person, subsection 3, to redress the deprivation under color of State law, statutes, ordinances, regulations, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

1. That the defendant directors, acting for and on behalf of the defendant Water District through and under the said resolution of March 2, 1960, for the condemnation of plaintiffs' land, is causing the defendant Water District to act, proceed and utilize its powers of eminent domain granted under the laws of the State of Oregon for the purpose of condemning the land of plaintiffs and that the said Water District's exercise of said sovereign right of the State of Oregon is not for a public use or other lawful purpose or necessity, but for the purpose of discriminating against plaintiffs because of plaintiffs' race or color, therefore violating plaintiffs' rights and privileges as citizens of the United States and the State of Oregon, and that the institution and prosecution of said condemnation action in the Circuit Court of the State of Oregon for Multnomah County for the taking of plaintiffs' property is unlawful by reason of the want of a lawful public necessity or use therefor.

2. Plaintiffs will suffer irreparable damage and harm if said Circuit Court action be allowed to continue.

3. Plaintiffs have no speedy or adequate remedy at law.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following:

#### JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the defendant directors, acting for and on behalf of the defendant Water District

and the defendant Water District and all persons acting for and on its behalf, and each of them, are hereby permanently enjoined from the further prosecution of the condemnation action entitled "Richland Water District, an Oregon public corporation, plaintiff, vs. Rowan M. Wiley, et al., No. 264-956," now pending in the Circuit Court of the State of Oregon for the County of Multnomah.

2. Judgment is hereby entered for plaintiffs upon the segregated issue that the actions of defendants heretofore taken to condemn and take possession of plaintiffs' property are unlawful.

## GOVERNMENTAL FACILITIES

### Courtrooms—Georgia

Clarence H. SENIORS etc. v. Honorable Luke ARNOLD, Chief Judge of the Atlanta Municipal Court and Honorable William B. Hartsfield, Mayor of the City of Atlanta.

United States District Court, Northern District, Georgia, Atlanta Division, June 3, 1960, Civil Action 7176.

**SUMMARY:** An Atlanta, Georgia, Negro filed a class action in United States District Court, alleging that he had been segregated while attending a session of the Atlanta Municipal Court and, while there, had observed that other segregated facilities are maintained. He asked for a declaratory judgment setting forth his rights, and for an injunction restraining defendant judge and city officials from continuing such segregation. Defendants moved to dismiss on the grounds that the conduct complained of affects the internal affairs of a state court, that plaintiff has an adequate state remedy, that there is no immediate irreparable injury, and that the complaint fails to allege that defendants are in charge of seating in the courtroom. The court granted the motion to dismiss.

In the complaint in the above stated case plaintiff alleges that he is a citizen of the City of Atlanta, Georgia, the State of Georgia and the United States and that he is a member of the Negro race; that the defendant, Luke Arnold is the Chief Judge of the Atlanta Municipal Court, and that the defendant, City of Atlanta is a corporation created by the laws of Georgia and that the defendant, William B. Hartsfield is Mayor of the City of Atlanta and its Chief Executive Officer.

Plaintiff alleges that on or about the 25th day of April, 1960, he attended a session of the Municipal Court of the City of Atlanta and that

he was forced to occupy a seat in the section "reserved for colored" and that "while segregated racially did observe that the courtroom maintained separate lock-up sections, restrooms and other facilities on a basis of racial segregation."

Plaintiff alleges that he "sues for himself and in behalf of others similarly situated" who are members of the Negro race and that the membership thereof "is too large to be joined as parties plaintiffs." Jurisdiction of the Court is invoked under Title 42, §§ 1981 and 1983, and Title 28, §§ 1331, 1343(3), 2201, 2281 and 2294 of the United States Code.

**[Seeks Declaratory Judgment]**

Plaintiff seeks a "declaratory judgment regarding the rights and legal relations of the parties to this suit, the subject matter, in order that such declaration shall have the effect of a final judgment" and an injunction restraining the defendants, "their assigns, agents, employees," from continuing to enforce any form of racial segregation in and about the Courtroom and from denying "citizens who are Negroes from the same access to all facilities as is afforded to non-Negro persons," etc.

The defendants have filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds:

1. That the Court should decline jurisdiction, in the exercise of its discretion, because the question involved is one affecting the internal operation of a state court "and within its power to regulate."
2. Plaintiff has an adequate remedy in the State Court in question and has made no effort to have his complaint redressed in that Court or any other State Court.
3. Because the complaint discloses no immediate, irreparable injury to plaintiff and that the effect of the judgment sought

"would be to interfere with the administration of state prisons and state criminal laws, contrary to equitable principles and to numerous decisions of the Federal Courts."

4. Because nowhere in the complaint does it appear that the "defendants, or either of them, are in charge of seating arrangements in the Courtroom in question, or segregation (if any) of persons in the City Jail, or that if said defendants did have control of said premises that they, or either of them, directed or ordered that plaintiff be segregated, or that they even knew of the occurrence."

The defendants' motion is now properly before the Court for determination under the Local Rules of this Court.

After due consideration of the allegations of the complaint and of the motion to dismiss, it is

ORDERED that defendants' motion to dismiss be, and the same is hereby sustained and the complaint dismissed. See *Pennsylvania v. Williams*, 294 U.S.176(6); *Dawley v. City of Norfolk, Virginia*, 4 Cir., 260 F.2d 647, cert. den., 359 U.S. 935; *Nichols v. McGee*, 169 F.Supp. 721.

## GOVERNMENTAL FACILITIES Training Schools—Maryland

**Robert MYERS, Minor by Mae Coleman v. STATE BOARD OF PUBLIC WELFARE, et al.**

Circuit Court of Baltimore City, Maryland, July 1, 1960, Docket A-142, File No. A-40055.

**SUMMARY:** A Negro boy, adjudged delinquent by a state circuit court in Baltimore, Maryland, and subject to commitment to a state training school, brought a class action in the same court against the state public welfare board and others to have declared unconstitutional statutory provisions requiring separate training schools for Negro and white youths. The court held the *School Segregation Cases* to be controlling and declared the statutory requirements unconstitutional for violating the Fourteenth Amendment's equal protection and due process clauses. It rejected the argument that those cases are limited in effect to conventional day schools, noting later decisions applying them to public residential schools as well. The court likewise overruled the contention that training schools established "for the care and reformation of delinquent minors" in which education is not the entire rehabilitation process are less than full-fledged schools within the scope of "public education" as the Supreme Court had used the term. Noting that the Supreme Court had cited the *School Segregation Cases* as controlling in cases involving public facilities as totally unrelated to public education as a beach and transportation lines, the court reasoned that they must certainly apply to public

institutions performing educational functions. A case holding the *School Segregation Cases* inapplicable to penal institutions was distinguished on the basis of the absence of prison security paraphernalia in the training schools and the close similarity between the curriculum and routine in the regular public schools and the training schools. The contention that the difficult task of rehabilitating delinquent youths would be aggravated by mixing races in the training schools and that the legislature might have had in mind avoiding this added burden as a proper governmental objective was also rejected. The court cited Supreme Court decisions that even the governmental objective of preservation of the public peace does not justify segregating races in public facilities; and it also discovered no evidence of the suggested purpose in the schools' legislative history. In response to the argument that wards of training schools are not entitled to equal rights under the Fourteenth Amendment because they have no right to be confined in the state's training schools and cannot dictate the terms of their rehabilitation, the court held that such persons lose no civil rights in being committed, that a court may not abridge their rights to due process even in selecting a training school, and that to deny a youth's right to attend a non-segregated training school would be *per se* a deprivation of his liberty without due process. And the court added, even if the *School Segregation Cases* did not cover state training schools, the state's statutes requiring segregation violate the Fourteenth Amendment's due process clause because court commitment under such statutes requires forced attendance in a segregated school against the ward's will in deprivation of his liberty. [See also attorney general's opinion at 4 Race Rel. L. Rep. 1087 (1959)].

MOYLAN, J.

#### OPINION

The Plaintiff, Robert Eugene Myers, a 13-year old Negro boy, was on October 28, 1959 before the Circuit Court of Baltimore City, Division for Juvenile Causes, on an *ex parte* Petition. He was alleged to be delinquent as a result of stealing merchandise from two Baltimore stores. After the testimony, that Court adjudged the plaintiff to be delinquent and announced that the boy, on probation at the time for previous thefts, would be committed to a training school.

Counsel for Robert Myers thereupon made a motion that the boy be sent to Maryland Training School for Boys, contending that Boys' Village is a racially segregated school, and that State statutes requiring racially segregated schools in Maryland violate both the Equal Protection and the Due Process Clauses of the 14th Amendment of the Constitution of the United States.

The Court continued the case for further hearing on the constitutional question raised, invited the State Department of Public Welfare, the Attorney General of the State, and the public training schools of the state to intervene as interested parties to file briefs and to appear at a further hearing to be scheduled for the taking of testimony and the arguments on the constitutional question. The delinquent boy was

sent on an Order of Detention to Boys' Village where he has remained since October 28, 1959, a period of eight months.

Before the scheduled re-hearing, the plaintiff filed in this Court the present proceeding, a class action in which he asks for a Declaratory Decree on the constitutional issue raised.

By stipulation, the parties agree that the physical and other tangible factors and facilities in these four State training schools are substantially equal.

#### [Sole Constitutional Question]

The parties agree that a real controversy exists, that all proper parties are included, and that this case presents the sole question: Is racial segregation in the State's training schools *per se* a violation of the due process or the equal rights clause (or both) of the Fourteenth Amendment of the Federal Constitution?

Sections 657 and 659-661 of Article 27, Annotated Code of Maryland, 1957 Edition, relate to the State's four public schools for delinquent minors:—Boys' Village, Maryland Training School for Boys, Montrose School for Girls, and Barrett School for Girls. These Sections provide that these schools are public agencies for "the care and reformation of minors committed thereto under the laws of this State," and further provide that the Maryland Training School shall be for white male minors, Boys' Village for



colored male minors, Montrose School for white female minors, and Barrett School for colored female minors.

In *Brown et al v. Board of Education et al.* 347 U.S. 483, 74 S.Ct. 686, the Supreme Court of the United States on May 17, 1954 declared the fundamental principle that racial discrimination in public education is unconstitutional, and in its Opinion after the rehearing on implementation on May 31, 1955 (349 U.S. 294, 75 S.Ct. 753) said:

"All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle."

#### [School Segregation Cases]

The controversy in this case revolves around the question: Are Maryland's public training schools a part of the State's public education system? Are they within or beyond the orbit of the Supreme Court decisions in the School Segregation Cases, and in later related cases involving other types of public facilities; all of which are now the supreme law of the land?

In *Brown et al v. Board of Education*, *supra*, the Supreme Court of the United States stated:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms . . . .

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others

similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment."

#### [Public Residential Schools' Status]

One contention of counsel for those named herein as parties defendant is that the Supreme Court in the School Segregation Cases was dealing with conventional elementary schools whose pupils return home daily at the close of each school day, whereas the youths committed to training schools must remain not only during the normal school day but night and day throughout the terms of their commitments. As a result, he contends that desegregation of the training schools could have the effect of enforcing *social* as well as *educational* association among the two races for twenty-four hours a day. The Supreme Court, itself, in a series of cases following the *Brown* cases, in which similar efforts were made to limit the scope and impact of that decision, summarily rejected these contentions as untenable, declaring that the fundamental and sweeping constitutional principle it had enunciated on May 17, 1954, applies to all levels of public education,—to public *residential* schools as well as to *day* schools. The Board of Trustees of University of North Carolina *et al v. Leroy Benjamin Frazier, et al*, 76 S. Ct. 467.

The possibility of social as well as educational contacts between the races is precisely the same at a public training school as at a State College, State University, or any other public residential school—except that these other schools are co-educational and Maryland's training schools are not.

#### [Training Schools As "Public Education"]

A second argument of Counsel for the Defendants is that the State's training schools having been set up "for the care and reformation of delinquent minors,"—and education being a part, but only a part, of the process of rehabilitating their young wards—these public training schools are something less than full-fledged schools, and do not fall within the scope of the

term "Public education" in the sense that such term was used by the Supreme Court in School Segregation Cases. This contention, the Court feels, is without merit.

The public education system of Maryland, in its wide and comprehensive scope, embraces many types of schools with diversified curricula and facilities. It includes not only the hundreds of public schools of the usual or orthodox pattern where the students commute to their homes after the usual school day, but also includes a chain of specialized residential schools where the students live at the school campus twenty-four hours a day,—such as the State University, five State Teachers Colleges and the Maryland School for the Deaf at Frederick (where the ages of the students range from 6 to 18 years). In all of these, following the Supreme Court's rulings in the School Segregation Cases, desegregation is already either a *fait accompli* or is in the planning stage.

The broad term "Public Education" encompasses not only the conventional schools, but hundreds of schools provided by the State at public expense for special groups with varying aptitudes, abilities, handicaps and problems.

*Public Education* includes in Baltimore City, for instance, the Baer School for the Physically Handicapped, an engineering preparatory school (Baltimore Polytechnic Institute), the Homewood Demonstration School on the Hopkins campus for academically talented children, the Montebello Public School with its accelerated courses for the gifted students, several vocational high schools, numerous ungraded classes, shop centers, and occupational classes for slow-learning and feeble-minded children. All of these schools are as much an integral part of a public educational system nowadays as the more typical neighborhood school; the lockstep curriculum for all students is a thing of the past.

The Baltimore City public school system includes, of course, the Bragg School for Boys and the Highwood School at Catonsville (both maintained and operated by the Baltimore City Public Schools although located in Baltimore County), where boys exhibiting flagrant anti-social behavior, personality distortions and emotional quirks are sent to be rehabilitated before they are returned by school authorities to their former classrooms.

These two Baltimore City public schools are set up exclusively for these problem boys who are not educable in the more routine classrooms

until their anti-social attitudes are re-formed and their hostility to all authority replaced by socially acceptable behavior. These two public schools, both correctional in nature, have enrolled in past years hundreds of emotionally unstable students *who have formally been adjudged delinquent* by the Circuit Court of Baltimore City, Division for Juvenile Causes, placed on Probation and assigned by school authorities to these schools *after full collaboration and EXCHANGE of opinion by the Court staff and school authorities*. The fact that they have been *adjudged delinquent* and are forced to attend, both by our compulsory education statute and by the joint decisions of Court and school officials, in no wise alters the basic identity and character of these schools as schools.

#### [Standard Auxiliary Tools Used]

The use of social case work, psychology, psychiatry, vocational training and character-building recreation as auxiliary tools by the training school in its over-all program of rehabilitative education parallels their wide-spread use throughout Maryland's system of public education. In the Baltimore City public school system there are 116 counsellors, 20 visiting teachers, a director of social work and 51 social workers, 2 psychiatrists, 12 psychologists and a clinical specialist. Grouped together in the Division for Special Services, they diagnose the problems of hundreds of maladjusted students with anti-social behavior patterns. The use of these important adjuncts and tools have become standard practice in all schools, including our public training schools. They do not transform either into some other type of institution.

*Public Education* is designed for all children in our communities,—the normal child, the gifted child, the slow learner, the emotionally unstable, and the delinquent youth. Nothing in the differing curricula or specialized educational techniques employed in any of these various types of schools emasculates them as educational institutions or strips them of their essential identity as schools set up by the State or Municipal Governments at public expense.

The per capita cost to Maryland taxpayers of educating each of the approximately one thousand boys and girls in the four State training schools is \$2,800 per annum. The per capita cost of maintaining the inmates in our prisons is approximately a third of that sum. It costs far more to secure experienced educators and

trained teachers than prison guards and turnkeys. These figures reflect the true educational character of the training schools. Maintained by the State at public expense, they are an integral part of its system of public education.

The Supreme Court in the Brown cases, in defining the importance of public education, could hardly have more specifically included the public training school than by including among the basic aims of educating a youth "helping him to adjust normally to his environment" and laying "the very foundation of good citizenship." This is precisely the vernacular of training school administrators.

#### [Other Public Facilities Desegregated]

In decisions following closely on the heels of the School Segregation Cases, the Supreme Court has made clear that the far-reaching constitutional principles announced on May 17, 1954 are not limited to segregated public schools but must be held to apply to public facilities totally unrelated to public education.

In *Dawson v. Mayor and City Council of Baltimore*, 350 U.S. 877, the Supreme Court, under the principle announced in the *School Segregation Cases*, affirmed the District Court for the 4th Circuit in holding that segregation of the races in public recreational facilities (a public bathing beach), even though separate facilities available to both white and Negro races were entirely equal, violated the equal protection clause of the Fourteenth Amendment. The Federal District Court had held that segregation could not be justified as a means to preserve the public peace as no proper governmental objective existed in the classification and segregation of the races in such facilities, saying:

\*\*\*\* if that power (State's police power) cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bath house facilities, use of which is entirely optional."

In *Gayle et al. v. Browder et al.* 77 S.Ct. 145, 352 U. S. 903 the Supreme Court in a Per Curiam Order, citing in support its previous decisions in the *School Segregation Cases*, affirmed on November 13th, 1956 a federal district court

which had held that state statutes requiring separation of the races on buses and other city transit lines in Montgomery, Alabama are unconstitutional.

#### [School Segregation Cases Control]

It could hardly be plausibly maintained that the rationale of the *School Segregation Cases*, and the fundamental constitutional principles decided, do not apply to public training schools—when the Supreme Court itself cites them as controlling in cases involving public facilities totally unrelated to public education,—a public beach and public transportation lines.

The language of the Supreme Court in the *Dawson* case, supra, and the *Gayle v. Browder* case, supra, would seem to provide the complete answer to another contention of Counsel for the Defendants that the already difficult job of rehabilitating delinquent youths would be greatly aggravated by mixing white youths and Negro youths in the training schools. Counsel points out that the General Assembly of Maryland, in enacting the segregation statutes regarding training schools might have had in mind this consideration, which could be considered as a proper governmental objective in separating the races.

#### [Legislative History Reviewed]

In this connection the Court, in reviewing the legislative history of our training schools, finds no evidence in support of such design by the General Assembly or the State Government. The State prisons, where the disciplinary problems are considerably greater, have never been segregated. Following the Supreme Court's decision in the *School Segregation Cases*, the State desegregated the Rosewood State Training School for feeble-minded children, many of whom have been adjudged as both "feeble-minded and delinquent." Within recent years, following enabling statutes enacted by the General Assembly, the State has established the Maryland Children's Center, (a Detention Home for Study of boy adjudged delinquent by our juvenile courts), the five State Forestry camps, to which our public training schools send Court-committed delinquent boys for the last-stage of their training program, and the Esther Loring Richards Clinic, to which the State's juvenile courts send delinquent children who have also been adjudged as emotionally disturbed. All of these institutions

receive children from the juvenile courts of Maryland—without regard to their race or color. The judge of this Court, in his day to day familiarity with these institutions as the presiding judge of the Circuit Court of Baltimore City, Division for Juvenile Causes, knows of no incident or trouble in any of them, disciplinary or otherwise, arising from the fact that they are operating as non-segregated institutions.

This Court, in a 17-year span of service as Judge of the Circuit Court of Baltimore City, Division for Juvenile Causes, has never known, nor read in the public press, of any such troubles arising in any of the public training schools throughout the country, the vast majority of which are non-segregated. The Children's Bureau of the United States Department of Health, Education and Welfare in 1956 published the results of its Survey of Public Training Schools for Juvenile Delinquents. (Bulletin # 33) It reveals (page 8) that 67 State training schools, even before the Supreme Court's decision in the Brown case, admitted children of all races. The Survey further reveals that segregation in training schools is the pattern in fourteen Southern states (pages 8 and 39), and that non-segregated training schools are the pattern in all but four of the remaining thirty-six states (page 8). Maryland with its four segregated public training schools is one of these four states. Of the several States de-segregating their training school since 1954, the border States of Missouri and West Virginia might be mentioned. The National Training School for Boys and the District of Columbia training school located at Laurel, Maryland, are non-segregated schools.

#### [Real Character and Basic Function]

In assessing the real character and basic function of a training school, an Opinion by Judge Alvey nearly a century ago is in point.

In *Roth and Boyle v. House of Refuge*, 31 Md. 329, decided July 2, 1869, the Court of Appeals, after holding that the Supreme Bench of Baltimore City acted within the jurisdiction and power it then had in reviewing and over-ruling a decision of the Baltimore City Court which had declared that a 12-year old boy had been illegally committed to the House of Refuge, then a private school which later became the Maryland Training School for Boys, went on to state, by way of dicta, at Page 334:

"Inasmuch as a grave constitutional ques-

tion has been fully discussed, involving the power of a Justice of the Peace to commit, and of the Managers of the House of Refuge to detain minors, charged as and proved to be persons of incorrigible or vicious conduct, so that his or her control is beyond the power of parent, guardian, or next friend, we deem it proper, in view of the great public importance of the subject, to say, . . . . that we are clear in the opinion that the power conferred upon the Justice of the Peace, as also that conferred upon the Managers of the House of Refuge by the 18th section of Art. 78, of the Code of Public General Laws, is in no wise in conflict with the Declaration of Rights, or the Constitution of this State. And that we fully concur in the reason and judgment of the Supreme Court of Pennsylvania, in disposing of a similar question in the case of *Ex parte Crouse*, 4 Whart. . 9."

"In accordance with the suggestion of Judge Alvey, the following opinion of the Court in *Ex parte Crouse*, 4 Wharton 11, is appended: *PER CURIAM*.—"The House of Refuge is not a prison, but a school where reformation, and not punishment is the end; it may indeed be used as a prison for juvenile convicts who would else be committed to a common jail, and in respect to these the constitutionality of the Act which incorporated it, stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of a Court, a magistrate, or the Managers of the Almhouse, that a doubt is entertained. The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all, by separating them from the corrupting influences of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?"

"It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it, is because it can seldom be put into better hands; but where they are in-



competent or corrupt, what is there to prevent the public from withdrawing their faculties, held as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one . . . . . As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; . . . . ."

#### [Impact of Roth Decision]

The Roth case, *supra*, decided in 1869, has had a far-reaching impact on juvenile court statutes and the development of training schools as schools. The first juvenile court in the United States was not established until thirty years later and the first juvenile court in Maryland not until thirty-three years later (1902). Some of the enabling statutes employ the language verbatim as initially used in the Crouse case and adopted *in toto* by the Maryland Court of Appeals.

Significantly, our Court of Appeals clearly recognized in 1869, when the House of Refuge and other training schools were in their infancy, and the educational courses and facilities provided for the young wards of our courts were comparatively meager and primitive, that nothing in their early status as "reform schools" or in the fact that the youths were committed to these schools by courts stripped the schools of their basic character as educational institutions. No juvenile courts being in existence at the time, the majority of the State's wards in these schools in 1869 were committed there by the criminal courts of Maryland or by justices of the peace exercising criminal jurisdiction. At present they are sent there by Equity Courts and other civil courts in which they have been tried in noncriminal proceedings. Statutes have specifically removed these juvenile courts and training schools from the orbit of the criminal system. These delinquent youths have no criminal record and lose no civil rights.

#### [Baker v. State]

In *Baker v. State*, 205 Md. 42, the Court of Appeals held that Boys' Village is a Reformatory within the meaning of our Escape Statute as amended and broadened by the Legislature in 1927 (Acts of 1927, Chapter 374) to include, in addition to penal institutions named in the old 1837 statute, "reformatories and any other place of confinement." The Court significantly observed that:

"All along the accent has been on education and training rather than upon punishment."

A careful reading of the language used by the Court of Appeals in the *Baker* case is persuasive that the decision was never intended to, and does not, strip the public training schools of Maryland of their basic character as schools, although the minors committed to them are in a sense restrained of their liberty. The word *Reformatory* must be placed in the context of the Court's entire Opinion.

"A Reformatory is an institution in which efforts are made either to *cultivate the intellect* or *instruct the conscience* or *improve the conduct* of inmates . . ." Black's Law Dictionary, 4th Edition (1951).

Reformatory Schools for juvenile offenders was an oft-used term in the English law of several decades ago, and the outmoded and fast disappearing term *reform school* was frequently used in America in the 1880's and 1890's as the name of early training schools.

#### [Training Schools Remain Schools]

The limited sense in which the Court of Appeals in the *Baker* case, *supra*, applied the term Reformatory and the alternate connotation oft applied to the term as a penal institution for younger convicted felons are two different things. In 1945 the State established the Reformatory for Males and the Reformatory for Females as the State's penal institutions for younger convicts. It retained the training schools *as schools*.

The Court of Appeals in *Jones v. House of Reformation*, 176 Md. at 45, noted that in 1935 "more than 400 colored boys were committed to Cheltenham School for Boys (since re-named Boys' Village) by courts of criminal jurisdiction." Its student population in 1960 includes only five committed by the State's criminal courts and 391 by the State's juvenile courts (civil courts) in non-criminal proceedings. On June 6, 1960, the four State training schools had a total student population of 1,056,—8 sentenced by criminal courts and 1,048 (or 99 $\frac{10}{100}$ %) committed to them by juvenile courts.

#### [Included in General Educational System]

The very statutes which established the Maryland Training School for Boys, the Cheltenham

School for Boys (since renamed Boys' Village), the Montrose School for Girls and the Barrett School for Girls and which refer to them as "public agencies for the care and reformation of the inmates," *specifically designated these institutions as schools by name*. Any suggestion that a "reform school" or "Reformatory" cannot be at the same time a full-fledged school is clearly a *non sequitur*. In addition, the Maryland Training School for Boys, the Montrose School for Girls and the Barrett School for Girls were *by statute specifically made a part of the general educational system of the State*.

"The Maryland School for the Deaf, incorporated under the Acts of 1857, Chapter 247, the Maryland Training School for Boys, organized under the authority of the Acts of 1918, Chapter 300 (Art. 27, Secs. 707-718), and the Montrose School for Girls organized under the authority of the Acts of 1918, Chapter 303, (Art. 27, Secs. 720-728), are each on January 1, 1923 placed in and shall thereafter exercise their functions as parts of the Department of Education. Each of said institutions shall continue under the management of their respective Boards. . . . under the general supervision of the State Superintendent of Schools." Article 41, Sec. 142 (Annotated Code of Maryland 1939 *Italics supplied*.)

Chapter 70 of the Acts of 1937, which set up Cheltenham School for Boys did not place it or its Board of Managers under the supervision of any State Department, but within a year (in 1938-39) the State Department of Education, at the request of State officials, made a thorough survey of the educational program of Cheltenham. The State promptly implemented the recommendations of the State Department of Education, provided an enlarged program of education at this school patterned after that in the other public schools of the State. The Court of Appeals notes in *Jones v. House of Reformation*, *supra*, at page 45 that the per capita cost in 1935 of educating boys at the Cheltenham School was \$200 per annum. Today the per capita cost is \$2,800, an increase of 1400%.

The proof is overwhelming that the State established these public training schools as schools. They are a part of the State's public education system. The Supreme Court's decision in the School Segregation Cases, *supra*, are therefore controlling.

#### [Milestone Dates]

In the century-old legislative history of the State's private training school and public training schools which succeeded them, several milestone dates mark sweeping changes, all of which gave tremendous impact and momentum to their evolution from primitive schools to fully equipped, modern schools, with full staffs of trained, accredited school teachers:—

- 1869 The Maryland Court of Appeals spoke out in *Roth v. House of Refuge*, *supra*.
- 1902 First juvenile court in Maryland established, three years after the first juvenile court in the United States was set up in Cook County, Illinois.
- 1943 New juvenile court law in Maryland for Baltimore City enacted. . . . an Equity Court succeeded old Magistrate's Court with jurisdiction in juvenile causes.
- 1945 Statewide law (several counties exempted themselves) reintroduced juvenile courts at the Circuit Court level.
- 1948 State training schools were placed in 1943 under newly created Bureau of Child Welfare of the State Department of Public Welfare, Art. 88A, Ann. Code, 1957. In 1948, Division of Training Schools was created within this Bureau. The transfer of supervision to this Bureau from the Department of Education reflected no step backward in the status of training schools as schools. The Report of the Governor's Maryland Commission on Juvenile Delinquency and its sweeping recommendations resulted in this and other statutory changes. The reasons urged for this change were logical. The State Department of Public Welfare already had a backlog of successful experience in its broad child welfare program embracing dependent and neglected children committed to it by juvenile courts. Fear was expressed that in the Department of Education's vast and complicated programs for 300,000 Maryland school children, the comparative handful of court-committed delinquents (less than 1,000 per annum) could well become a "stepchild" and be overlooked. The change in State policy has accelerated the educational program of the training schools, teachers salaries

have doubled, appropriations for needed facilities have skyrocketed and modern school buildings have multiplied.

- 1945 Reformatory for Males of 16 to 26 years (a penal institution) established. The resulting change in the make-up of the training school populations, with the siphoning off of hundreds of young criminal offenders, formerly committed to the training schools, has been a genuine metamorphosis. It has lessened old problems and tensions, lowered the average age and the size of the classes, and advanced the progress of these institutions as schools for younger, more tractable children.

[Nichols v. McGee Distinguished]

The case of Nichols v. McGee, 169 F.Supp. 721, (appeal dismissed, 381 U.S. 6) in which segregation in state (Cal.) prisons is upheld, is rejected as wholly inapplicable. That case dealt with a state prison and not a school. There is simply no more resemblance between a training school and a prison than there is between delicate brain surgery and an ax murder. The Court in the Nichols case fully recognized this fact when it stated:

"The Brown case rationale cannot be extended to State penal institutions, where inmates and their control, pose difficulties not found in educational systems."

Counsel for the Defendants contends as an alternative proposition that a public training school, if neither strictly prison nor school, is at least a hyphenated or hybrid institution combining features of both, and therefore the Supreme Court's decisions in the School Segregation Cases are not relevant.

Plaintiff's Exhibit #3, prepared by the Superintendent of the Maryland Training School for Boys, provides concrete and convincing evidence that our four training schools are basically schools, and not custody-centered institutions, with education secondary. The well-balanced, over-all educational program at the Maryland Training School is not an academic facade,—and it is substantially equal to the instruction and courses provided at the other three State training schools, as the parties have stipulated.

[An "Open Program"]

Even the training schools' responsibility for custody is discharged, and the number of runaways kept within control, by keeping the youths usefully at work in the well-rounded and diversified educational program provided in the classrooms, the vocational workshops, the dormitories and cottages, and on the campus. As Raymond Manella, Director of the Bureau of Training Schools of the Department of Public Welfare testified, our training schools are "neither maximum security nor minimum security institutions. They have an open program." None of the routine paraphernalia of the prison - - - locked doors, cell blocks, prison guards, and fences surrounding the institutions topped by barbed wire - - - is present. The Courts, representing the State as *parens patriae* in performing the parental role imposed by the juvenile statutes, do not send their young wards there to be placed in cold storage, but to be educated and trained in good citizenship. The purpose of such statutes is "preventive and not punitive."

Respect for authority and for the personal and property rights of others, conforming to socially acceptable standards of behavior, good work and study habits, and the importance of re-forming anti-social traits and respecting all laws are emphasized in all phases of, and are an ingrained part of, the well-rounded training school program, curricular and extra-curricular, just as they are in all schools. In this fashion the Schools rehabilitate and re-form the delinquent youth and safeguard society from his recidivism at the same time. Courses in Civics, Good Citizenship, and Problems in Democratic Living are taught in the classrooms. Training school youths are taught to "play by the rules" in the school gymnasiums, cottage game rooms and on the athletic fields. They are taught how to get along with other people in their cottages, under the supervision and instruction of trained cottage personnel. All of these activities are component, coordinated and complementary parts of the unified school program, and are not to be thought of as competing and separate objectives of a training school. Without the School and its educational program, the institution could be likened to the play without Hamlet.

[Training School Program Reviewed]

The program at the Maryland Training School

for Boys (Plaintiff's Exhibit # 3), substantially equal to that of the other three state training schools, is carried on in three schools:

1. The Junior School with grades for the primary group (8, 9, 10, and 11 years old) and through the ninth grade for boys 12, 13 and 14 years old;
2. The Senior School; and
3. The Junior-Senior High School with grades up to the 12th. The curriculum includes algebra, geometry, trigonometry, chemistry, physics, world history, United States history, Problems of Democratic Living, and Civics.

The school day runs from 8:30 a.m. to 12:00 noon, and from 1:00 p.m. to 4:30 p.m. Vocational shops are: automobile machine shop, printing and carpentry.

The training school curriculum is so closely patterned after that in other public schools that a child, committed on December 6th or on March 2nd, for instance, can enroll in and keep up with his regular class, and when his scholastic grades and credits are earned, can usually return to his former school in his neighborhood for the opening of the fall semester, or even in mid-semester, without academic difficulty.

The public records of every juvenile court in Maryland contain additional convincing proof that our State training schools are *bona fide* schools. Court records reveal that even the responsibility for custody is met by means of the Schools' coordinated educational program. The vast majority of children at our training schools are there on indeterminate commitments. The length of stay at the institution (the average is about eight months) is determined by the boys and girls themselves in passing their school work and earning their academic grades. Detailed and informative Progress Reports are sent regularly to the committing judge at the close of each of two Semesters, just as report cards are sent to parents periodically by other schools. Not only do the youths in our public training schools visit their homes for a week at Christmas, and for several weeks during the summer vacation, but as a reward for good school progress and obedience to school rules of conduct, are allowed periodically to visit their homes for week-ends. This has been going on for more than ten years in Maryland, and the negligible number of boys and girls who fail to return (and have to be called for) at the end of their home

visits is much smaller than the number who escaped in the old days when these schools, to prevent escapes, used the austere and repressive methods associated with standard prison life.

#### [Equal Rights Guarantees Applicable?]

Counsel for the Defendants argues in his Brief that the equal rights guaranteed in the Fourteenth Amendment could hardly apply to youths in a training school because:

"It is hardly a fundamental civil right of a citizen as a member of society to have himself incarcerated in one of the State's correctional training institutions; nor is it a civil right for one so incarcerated to dictate the terms under which he may be rehabilitated. The purpose of his confinement is the antithesis of freedom and liberty, and while we may not view the juvenile offender as a criminal in the classic sense, it is clear that he is removed from society for the protection of society, and restrained of his liberty until such time as his fledgling criminal and antisocial tendencies can be checked and remedied by institutional confinement."

#### [The Court's Conclusions]

In considering this contention, the Court reaches several conclusions:

1. The child committed to a training school loses no civil rights. A citizen may have no fundamental civil right to be confined in a public correctional school but the Court has no right to abridge the minor's constitutionally guaranteed right to due process at every stage of the Court proceeding including the Court's selection of a training school.
2. The word incarceration defined in standard dictionaries as imprisonment, is derived from the French root word *carcer* which means *prison*. It is incorrectly applied to training schools.
3. Although the court-committed youth cannot dictate to the judge the institution to which he is to be sent, the proper legal question or Constitutional criterion is,—Can the juvenile court judge, in selecting the institution, systematically exclude all Negro delinquents from the Montrose School for Girls and the Maryland Training School for Boys, and systematically exclude all white delinquents from the Barrett School for Girls and Boys' Village? The corollary



to that question is this: Can the Maryland statutes which require the juvenile court judges to do that very thing be upheld as constitutional in the face of the decision of the Supreme Court of the United States in *Bolling v. Sharp*, 347 U.S. 497, that such denial of a youth's right to attend a non-segregated school is *per se* a deprivation of his liberty without due process of law?

#### [Due Process Clause Violated]

If, *arguendo*, the Courts should hold that the Supreme Court's decisions in the School Segregation Cases do not apply to training schools and that Maryland statutes requiring segregation in them do not violate the Equal Rights Clause of the Fourteenth Amendment to the Federal Constitution,—these segregation statutes do nevertheless violate the Due Process Clause of the Fourteenth Amendment.

In *Bolling v. Sharp*, *supra*, segregation in the public schools of the District of Columbia was held to be in violation of the Due Process Clause of the 5th Amendment. The Court there said:

"We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. ....

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective. Segregation in public education

is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution."

The rationale of the Supreme Court Opinion in *Bolling v. Sharp*, *supra*, would apply much more forcibly to the present case than it did to the District of Columbia case. The District student's loss of liberty without due process of law lay solely in the denial of his right, the Supreme Court decided, to attend a non-segregated public school while living in his home and community. In this case, the Court Commitment, coupled with the Maryland segregation statutes, not only requires his forced attendance in a segregated school against his will, but during several months of forced detention he experiences, in addition, an actual loss of his liberty in the conventional sense.

When a citizen's constitutional rights are abridged he goes to the Courts for redress and for enforcement of those rights. The Courts in their own proceedings are hardly under less obligation to observe the constitutional right to due process of all parties before the Court than a District of Columbia School Board or other administrative agency in pupil assignments.

#### [Statutory Provisions Unconstitutional]

For the reasons set forth, the Court holds that those parts of the statutes (Sections 657 and 659-661 of Article 27, Annotated Code of Maryland, 1957 Edition) which require separation of the two races (Negro and white) in the four State training schools violate both the Equal Rights and the Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States, and are therefore unconstitutional.

An Order will be entered in conformity with this Opinion. July 1, 1960.

## HOUSING

### Discrimination—New York

**Edmond MARTIN v. CITY OF NEW YORK and the Commission on Intergroup Relations.**

Supreme Court, Special Term, New York County, New York, Part I, April 1, 1960, 201 N.Y.S.2d 111.

**SUMMARY:** Plaintiff, a New York landlord, sought a declaratory judgment declaring invalid New York ordinances forbidding the owners of multiple dwellings to deny accommodations on account of race, color or religion (3 Race Rel. L. Rep. 92, 4 Race Rel. L. Rep. 453). Plaintiff contended that the ordinance was an unjustified interference with his property right in his business. The court rejected this argument, pointing out that the fair employment statutes, which interfere just as much with property rights, have been uniformly held to be constitutional. The individual must yield in this case, the court ruled, "to what legislative authority deems is for the common good." A cross-motion by the city of New York to dismiss was granted.

ARON STEUER, Justice.

The action is for a declaratory judgment. The motion and cross motion are for summary judgment. The purpose is to test the constitutionality of Local Law 80. Whatever else one may think about the plaintiff or this proceeding, one thing is admirable, the directness and simplicity of the attack. Local Law 80 is designed to prevent discrimination in housing and forbids owners of multiple dwellings to deny accommodations on account of race, color or religion. A somewhat unusual machinery is set up to determine whether a landlord has in fact refused to rent on the forbidden grounds and to induce him to change his ways without the necessity of punitive or coercive action. But it is no flaw in these provisions that plaintiff points to. Plaintiff has stated openly and unequivocally that he will not rent to negroes. He challenges the proposition that any government can impose any restriction or condition on his right to approve or disapprove any applicant for tenancy. To use his own example, he claims an inviolable right to rent to red-headed women and no others, if he so chooses.

A library of respectable proportions could be filled with the volumes written on the question which this application raises. And no small proportion of the space would be devoted to judicial opinion. These conditions dispense with the need for elaborate exposition but do make it difficult to make a succinct statement of the reasons prompting decision without appearing to pontificate. The basis of plaintiff's complaint with the statute is that it is an unjustified interference with his property rights in his business. He claims that a vital element in successful rent-

ing is the selection of tenants and that any regulation which hampers the exercise of his judgment in this phase of his business is beyond the power of the state. To an extent he is correct. Just because a man is a negro he is not, *ipso facto*, a desirable tenant. But the statute does not say that. It says the converse—because a man is a negro he is not, *ipso facto*, an undesirable tenant. And in that the plaintiff disagrees.

It has long been recognized that the state has the power to make many regulations in regard to rental housing. It is so familiar that citation is unnecessary that the size, area, type of construction, window space and sanitary facilities are all subject to regulation, as are the number of people who may occupy a given space. Each of these regulations was at one time regarded as an encroachment on free enterprise or the rights of private property. The same arguments against these regulations are now considered obsolete as regards the subject matter and are no longer heard.

It is now believed that many of our problems arising from the diverse nature of our population will be brought nearer solution by integration. Statutes now forbid racial discrimination in hiring. These have been found constitutionally unobjectionable (*Holland v. Edwards*, 307 N.Y. 38, 42, 119 N.E.2d 581, 583). The interference with private business is just as great but it has had to yield to changing concepts of what the state can and should do.

Plaintiff asserts that many landlords do what he wants to do but do it by stealth and indirection, which he scorns. Unfortunately, it is very probable that he is right. Changes are resisted in many ways, not all of them honorable. Here assistance is given the evader by the difficulty of

proof. It is difficult to prove that a prospective tenant was rejected for racial reasons. But the fact that some may evade the statutory prohibition is no reason for nullifying the statute or abandoning the purpose it seeks to accomplish.

Lastly, there is plaintiff's argument that he may limit his tenancies to ladies with red hair if he so elects. As an argument, this is not quite as bizarre as it seems, because, if he can exclude all men and the great majority of women, why can he not exclude negroes? The answer is a practical one. While there may be an occasional landlord who would allow such a vagary to control his rental policy, the situation, if it exists at all, is so rare that legislation in regard to it has not been occasioned. Landlords, like others in

business, are actuated by a profit motive. Any such policy would no doubt soon see a landlord out of business, so instances do not occur.

After all, plaintiff's voluminous papers do not reveal any personal prejudice against negroes, and his complete candor on the subject leads to the belief that if he had any personal feeling he would have expressed it. His objection is that having negro tenants would in one way or another eventually lessen his rental income. Obviously, if the purposes of the statute are effected, this cannot be true. But whether it is or no, it is an additional instance where the individual must yield to what legislative authority deems is for the common good.

Motion denied; cross motion granted.

## HOUSING

### Public Housing Authority—Georgia

Ned KENNEDY, individually and as Chairman and Representative, etc. and H. C. Price, individually and as Chairman and Representative, etc. v. HOUSING AUTHORITY OF SAVANNAH.

Superior Court of Chatham County, Georgia, August 16, 1960, Case No. 2004.

**SUMMARY:** A suit against the public housing authority of Savannah, Georgia, was brought in a state court by an individual for himself and as a class representative for other property owners similarly located near an authority housing project and by another individual for himself and as a class representative of project tenants, seeking to enjoin the defendant from committing allegedly unconstitutional acts. The plaintiffs alleged that action of the defendant in terminating the leases of white persons in the project in order to replace them with Negroes would soon result in an all-Negro neighborhood; but defendant justified the action on the ground that Negroes could make a better use of the project in view of the high vacancy rate among white tenants and the availability to them of adequate white housing facilities elsewhere. The court dismissed the suit both as to the original representative and as to a substituted representative of the tenants and also as to the tenants themselves, because a member representing a class must have a cause of action in himself in common with the other class members, which was not the case with these representatives who did not live in the project. A motion objecting to the representative of the nearby property owners as a party was overruled because the individual was himself an owner. But the court sustained a demurrer and dismissed the remaining petition because: (1) plaintiff's challenge to provisions of the state housing authorities act, though referring to it generally and to specific sections as shown in an unofficial codification of state laws, was too vague and indefinite to present a constitutional question before the court for decision; and (2) defendant's actions fell within the terms of its statutory powers, the express power to lease being held impliedly to include the power to terminate leases. Also, the court re-

jected the argument that this decision of the authority, being a major change in policy, had to be approved by the state director of housing, holding instead that the housing act requires such approval only upon the undertaking of a project.

McWHORTER, Judge.

#### ORDER

This suit was brought by Ned Kennedy, individually and as Chairman and Representative of the Association of Adjoining Property Owners of Francis Bartow Place, and H. C. Price, individually and as Chairman and Representative of the Association of Tenants of Francis Bartow Place, against the Housing Authority of Savannah, seeking an injunction against said Authority.

When the rule nisi came on to be heard, the defendant made the following oral motion in the nature of a general demurrer:

"The defendant moves to dismiss the petition on the ground that the petition fails to set forth any cause of action against the defendant, that it fails to show any grounds for equitable relief and for equitable restraint against the defendant. It fails to show that either of the plaintiffs, either individually or as representative of the named classes or named groups set forth in the petition, has any status to obtain such relief, any right to obtain such relief, the relief requested in the petition. The petition fails to set forth any legal rights, equitable rights, constitutional rights or other rights which can be protected by the law which these plaintiffs have and which would be violated by the alleged action of the defendant."

The Court took the motion under advisement and elected to hear the evidence so that the whole matter could be considered at once.

#### [The Evidence]

The evidence showed that there was a voluntary meeting of the tenants of the Francis Bartow Place and of landowners in the immediate vicinity thereof, and that each association elected one person to represent them in the contemplated suit against the Housing Authority of Savannah. It further developed that H. C. Price, the representative of the tenants was not a tenant and never had been a tenant of the Housing Authority at the Francis Bartow Place. The Court

intimated that he was not a proper representative. The hearing was recessed for lunch and after lunch plaintiffs' counsel made a motion to continue or recess the hearing until July 26, which motion was granted.

On July 26 plaintiffs presented an amendment adding an additional paragraph, known as paragraph 2(a), making ANNIE BELL PANICK a party plaintiff, stating that "She had been a tenant in Francis Bartow Homes for a number of years; that she is a duly selected representative of the tenants of Francis Bartow, whose rights are similarly violated by the Defendant; that the plaintiffs' personal and property rights are in jeopardy by the acts and intended acts of Defendant, and the rights of their representative groups are likewise jeopardized and affected."

While the evidence showed that ANNIE BELL PANICK had been selected as a representative of the tenants, it also showed that on the day of her selection she had completely removed from the Francis Bartow Homes and had become a tenant in another housing project operated by defendant. Whereupon, the defendant moved that Annie Bell Panick be stricken as not a proper party plaintiff.

#### [Community Interest Essential]

In class actions it is necessary that the party plaintiff representing the class have a common right or community interest with all other members of the class. (See 39 Am.Jur. 921, Parties, Section 47; also page 922, Section 49: "The general rule is that one or a few persons may prosecute a cause of action or interpose a defense for the benefit of others who are not parties to the action *only where they might properly be joined as parties because they have a common or general interest or are united in interest.*" (Italics added by the Court.)

This general rule is followed in Georgia. (O. J. Spread Co. v. Hicks, 185 Ga. 507, discussion of court beginning on page 512.) The Court need not elaborate on the decisions cited or those that follow the O. J. Spread Co. case as the rule is firmly established by our courts; likewise, by Code Sections 3-108 and 3-109, which provide both in contract and tort that no one can bring a suit unless the cause of action



is vested in him. Code Section 37-1002 must be construed in harmony with these other Code Sections. The Court concludes that to bring an action in behalf of a class, the member representing the class must have an actual cause of action in himself. It knows of no authority that the members of a class may elect an utter stranger to the class to bring action in their behalf, nor, has counsel cited any. At the conclusion of the evidence on July 26, defendant renewed its motion heretofore made in full and specifically objected to H. C. Price and Annie Bell Panick as parties plaintiff representing the tenants. Upon the basis of the facts shown, the motion must be sustained, and the case is hereby dismissed as to these parties and of those they allegedly purport to represent.

#### *[Constitutional Question Not Presented]*

The motion objecting to parties must be overruled as to Ned Kennedy as he is an actual property owner in close proximity to the housing project. The petition attempts to challenge (See paragraph 7 of the petition) the constitutionality of the Housing Authority Act under the due process clause of both the Federal and State Constitutions. Under the requirements of pleading, no constitutional question is presented to the Court for decision. Our Supreme Court, in the case of *Stegall v. Southwest Georgia Regional Housing Authority*, 197 Ga. 571, goes into great detail as to what is required in order to raise the constitutionality of a statute. If it was not done in that case, it is not done in this case. In the case cited the identical sections of the Constitution were said to have been violated as in this case, and it was held that the attack was too vague and indefinite to challenge the constitutionality of the Act. (See also *Adams v. Ray*, et al., 215 Ga. 656) Hence no constitutional question is before the Court for decision.

The only section of the Housing Authorities Law referred to in plaintiffs' petition is 99-1115 as codified in Georgia Code, Annotated. The last official code adopted by the Legislature was the Code of 1933, the adopting act being approved February 14, 1935. (See Georgia Laws, 1935, pages 84-85.) The first Housing Authorities Act adopted was approved March 30, 1937 (See Georgia Laws 1937, pages 210-230). Therefore, the Housing Authorities Law is not contained in any official Code of this State. Its constitutionality cannot be attacked by referring to it generally or to specific sections as shown in an

unofficial codification of Georgia laws published by a lawbook publishing company since the adopting act of 1933. The official Code of 1933 contained no such section as 99-1115, hence the designation of such a code section is too vague and indefinite to raise the constitutionality of the statute or the part referred to. (*Bowen v. State*, 215 Ga. 471-72).

#### *[Consequences Upon the Prayer]*

Since the prayer of the petition is that the Housing Authority be restrained from committing unconstitutional acts, and no question as to the constitutionality of the statute was raised, the prayer must be denied or at least limited to acts that fall entirely outside the purview of the powers given or of necessity implied to the Authority under the Housing Authorities Law.

During the course of the trial plaintiffs' counsel stressed certain sections of the Housing Authorities Law as given in the unofficial codification in Title 99 (Book 28) of Georgia Code, Annotated, which are used here to save confusion. The first section stressed is 99-1115, defining in general terms the power of the Housing Authority. Subsection (d) of this section of the Act gives the right to the authority to lease or rent any dwelling houses, etc; or revise rents or charges, etc. Subsection (b) gives it the right to operate housing projects. The right to operate must of necessity include the right to cease operation; the right to lease must of necessity include the right to terminate leases; and in terminating the leases of tenants within Francis Bartow Homes, the Housing Authority is acting within the scope and general powers of its authority.

#### *[No Minutes of Decision]*

Much is also made by plaintiffs' counsel when it was brought out that there were no minutes made of the decision of the commissioners of the Housing Authority to discontinue the leases in this housing project. Section 99-1112 of the Act provides that three shall constitute a quorum for the purpose of exercising its powers and for all other purposes. Action by the Authority may be taken upon vote of the majority of the commissioners present unless in any case the by-laws of the Authority shall require a larger number.

The executive director of the Authority testified that at this meeting there was a quorum (at least three members) present when the

action to discontinue the leases in Francis Bar-tow Homes was decided upon. It, therefore, appears that under the Act itself the action is valid. There is no requirement by statute or by-law that the Authority should keep written minutes. At least, none was brought to the attention of the Court.

Another point made by counsel during the trial of the case was that this being a major change of policy, it had to be approved by the State Director of Housing. Section 99-1109 simply provides that no project shall be undertaken without such approval. This refers ostensibly and by the language of the Act to the original undertaking and not to a change in policy. The

only requirement as to renting apartments or units binding upon the authority is that they shall be to families of low income. It has not been shown in this case that it is anticipated that the Authority will do otherwise than comply with Section 99-1117 of the Act.

For these reasons the petition and the evidence fail to set forth any threatened invasion of the rights of plaintiffs. Hence the temporary injunction is denied. The motion of defendant in the nature of a general demurrer is hereby sustained and the petition dismissed.

In Open Court this 16th day of August, 1960, nunc pro tunc as of the 15th day of August, 1960.

## INDIANS

### Indian Lands—New Mexico

**UNITED STATES of America in behalf of the PUEBLO OF SAN ILDEFONSO v. Harley BREWER and Mrs. Harley Brewer.**

United States District Court, District of New Mexico, June 24, 1960, 184 F.Supp. 377.

**SUMMARY:** A female member of the San Ildefonso Indian Pueblo, claiming with her parents property rights in an allotment of land situated within Pueblo lands near Santa Fe, New Mexico, married a non-member, following which she and her parents (Pueblo members) purported to convey a life estate in approximately a half acre of the allotment to her husband's parents (non-members), who built and occupied a house thereon. There was no evidence of approval by the United States Secretary of the Interior. The United States brought an action in federal court in behalf of the Pueblo against the non-member couple to deliver to the Pueblo possession of the half-acre and to restrain defendants from further trespass thereon. The court noted that the Pueblo lands had been originally granted by the government of Spain and that the Pueblo Indians thereon were successively considered as wards of the Spanish, Mexican, and United States governments, having a communal title and being without power to alienate any of the lands without governmental consent. It was also noted that under a congressional act of 1924 no right, title, or interest in lands of the Pueblo Indians of New Mexico could be conveyed without approval of the Secretary of the Interior, and that this legislation was valid under Congress' power to govern Indians' rights, especially since the United States owns the fee to Indian lands subject only to the right of occupancy and therefore title to Indian lands can only be acquired pursuant to congressional enactment. Although defendants had lived on the land for over seven years, the court held that an estoppel would not work against the federal government. It was also held that the doctrine of unjust enrichment does not apply in the absence of congressional legislation and that the situation was not analogous to a case of exercise of eminent domain, because these defendants had never had title to the land in question. They were allowed six months, however, to vacate the premises and granted leave to remove as much of the improvements and building materials as they were able.

## INDIANS

### Jurisdiction—North Dakota

In the Matter of Sandra Jean HOLY-ELK-FACE et al., Minors.  
STATE of North Dakota v. Aurelia Faye HOLY-ELK-FACE et al.

Supreme Court of North Dakota, July 13, 1960, 104 N.W.2d 308.

**SUMMARY:** The juvenile commissioner of a North Dakota county petitioned a state juvenile court to terminate the parental rights of an Indian man and woman with regard to three named children and to have their care, custody, and control transferred to the state public welfare board. After a hearing on the petition, the question of the court's jurisdiction was certified to the state supreme court. Included in the certification were the facts found from the hearing that, although the man and woman are both enrolled Sioux Indians, neither of them reside upon any Indian reservation; that they had not cohabited since 1956 and that the man had abandoned the children, two of whom he refused to acknowledge as his own; and that the woman had for several years past been openly and continuously guilty of gross moral and sexual misbehavior and is wholly unfit to have the custody, care, and control of the children. The supreme court first determined that the trial court had "abundant" statutory grounds for jurisdiction unless the statutes were rendered nugatory because the children are offspring of enrolled Indian parents. Inferring from the record that the acts of the parents which constitute grounds for terminating their parental rights occurred within the trial court's territorial jurisdiction and outside the bounds of any Indian reservation, the court held that, inasmuch as the Indian parents are not reservation residents, they are not subject to any tribal law bearing upon the facts or law involved in the case nor to any federal statute which would have governed their domestic relationships upon a reservation. It therefore agreed with the trial court that the latter had jurisdiction.

## ORGANIZATIONS

### Membership Corporations—New York

Application of ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC.,  
v. Caroline SIMON, Secretary of State, etc.

Supreme Court, Special Term, New York County, New York, Part I, April 1, 1960, 201 N.Y.S.2d 135.

**SUMMARY:** Pursuant to certain provisions of the New York Membership Corporation Law, plaintiffs submitted a certificate of incorporation to a New York Supreme Court for approval. Upon a finding that the organization's avowed purposes of promoting "individual freedom of choice and freedom of association" and of assisting in "the elimination of barriers to individual freedom of choice" negated the State's public policy of equality before the law, the court refused to approve the charter. 187 N.Y.S.2d 706; 188 N.Y.S.2d 885, 4 Race Rel. L. Rep. 690 (1959). After being chartered in the District of Columbia, the association petitioned the New York Secretary of State for domestication. This she refused. 5 Race Rel. L. Rep. 259 (1960). The association then sought a writ of mandamus requiring the secretary to accept the certificate for filing. The court denied the motion, holding that the statutes which allowed the refusal were not unconstitutional.

EDGAR J. NATHAN, Jr., Justice.

This purports to be a proceeding under article 78 of the Civil Practice Act in which petitioner,

complaining of respondent's refusal to accept for filing and to file its certificate of incorporation as a membership corporation, seeks an order of

mandamus. The proposed certificate is not submitted, but it will be assumed that it is in every respect proper in form save for the absence of approval by a justice of the Supreme Court. Such approval has been refused (*Matter of Association for the Preservation of Freedom of Choice, Inc.*, 17 Misc.2d 1012, 187 N.Y.S. 2d 706; *Id.*, 18 Misc. 2d 534, 188 N.Y.S.2d 885; *Id.*, 10 A.D.2d 604, 199 N.Y.S.2d 435).

For the purpose of this motion, the petition is deemed complete, and adequate to raise the issue as joined by respondent's cross motion to dismiss for insufficiency. The sole contention is that respondent must accept the certificate for filing and should be directed to do so because section 10 of the Membership Corporation Law

and section 212, subd. 2 of the General Corporation Law are unconstitutional as applied to the petitioner. This court does not agree with petitioner's contentions and holds that section 10 of the Membership Corporation Law and section 212, subd. 2 of the General Corporation Law are not unconstitutional. Accordingly, the relief sought in this proceeding for an order to direct the respondent as Secretary of State to accept and file a certificate of incorporation of Association for the Preservation of Freedom of Choice, Inc., or a certificate to do business in this State as membership corporation without the approval of a justice of the Supreme Court, is denied; the cross motion is granted; and the petition is dismissed.

## ORGANIZATIONS NAACP—Alabama

**Ex Parte NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE.**  
**In re STATE of Alabama ex rel. MacDonald GALLION, Atty. Gen. v. N.A.A.C.P.**

Supreme Court of Alabama, July 11, 1960, 122 So.2d 396, July 11, 1960.

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation v. MacDonald GALLION, Attorney General of Alabama; Mrs. Bettye Frink, Secretary of State of Alabama.**

United States District Court, Middle District, Alabama, Northern Division, August 11, 1960, Civil Action No. 1622-N.

**SUMMARY:** The Attorney General of Alabama brought suit in an Alabama state court to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws requiring registration of foreign corporations. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707 (1956). Later, the court ordered the Association to produce certain books, papers and documents, including a membership list; and, on refusal to produce the latter, the Association was adjudged in contempt and fined. 1 Race Rel. L. Rep. 917 (1956). The Alabama Supreme Court denied certiorari to review the contempt order. 1 Race Rel. L. Rep. 919; 91 So.2d 214, 2 Race Rel. L. Rep. 177 (Ala. 1956). The United States Supreme Court granted certiorari, and subsequently found that "the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." The judgment of contempt and fine were dissolved and the case remanded. 357 U.S. 449, 3 Race Rel. L. Rep. 611 (1958). On remand, the Association moved the Supreme Court of Alabama to send the United States Supreme Court mandate to the original state trial court so that a hearing might be had on the merits of the injunction that had been issued. The motion was overruled, and the judgment was again affirmed. The court, although



recognizing that the Association was not in contempt for refusing to submit its membership lists, held that it was still in contempt for failure to produce the other "certain books, papers and documents" described in the lower court's order. [See also *NAACP v. Jones*, 109 So.2d 140, 4 Race Rel. L. Rep. 376 (Ala. 1959)]. This judgment was reversed by the United States Supreme Court upon a second grant of certiorari. The court held that, since in the former proceedings before it the state had not denied the Association's claim to have satisfactorily complied with the production order except as to membership lists, the Alabama Supreme Court was foreclosed from re-examining the grounds of the United States Supreme Court's disposition. The court noted, however, that if it should appear necessary, upon further proceedings in the trial court, the Association could further be required to produce other items such as may be appropriate, reasonable, and constitutional. A petition for a writ of mandamus against the Alabama Supreme Court was denied, on the assumption that it would now promptly comply with the mandate of the prior decision. 360 U.S. 240, 4 Race Rel. L. Rep. 535 (1959). On remand the second time, while noting its disagreement with the conclusions of the United States Supreme Court, the Alabama Supreme Court on July 11, 1960, remanded the cause in turn to the state circuit court where it originated, with directions that the latter court "undertake such proceedings as may be deemed proper" and that the 1956 temporary injunction remain in effect pending a final determination of the cause on its merits. Meanwhile, because in its opinion the state Supreme court had not proceeded "promptly" under the United States Supreme Court's mandate, the Association on June 23, 1960, had filed an action in a federal district court in Alabama, alleging jurisdiction in that court to redress the deprivation by Alabama state officials of a right, privilege, or immunity secured to the Association and/or its members by federal constitutional and/or statutory provisions for equal rights of citizens and to redress a deprivation of its equal rights and protection under the law as provided by the federal Civil Rights Act. Therewith, the Association also moved the court for a temporary restraining order to restrain the state's attorney general and secretary of state from refusing, because of the 1956 restraining order, to register it; but the motion was denied on June 24. Following the remand by the state supreme court on July 11, defendants in the federal court action on July 13 filed an amended motion to dismiss. While holding that there was "no serious question" about its jurisdiction to entertain the instant suit, the latter court decided not to exercise that jurisdiction. It was pointed out that the United States Supreme Court had indicated in its last decision in the case the route open to the Association to secure a prompt trial and review if appropriate. Also the court emphasized that a federal court should not exercise its jurisdiction when, as here, an action is "in the breast of a state court" and one of the litigants therein seeks to invoke the injunctive powers of the federal court. Assuming that the state officials would observe their oaths to protect the constitutional rights of all citizens, the court therefore denied the Association's motion for a preliminary injunction and dismissed the action. The opinion of the Alabama Supreme Court remanding the case, and the opinion and order of the federal district court dismissing the action by the Association are set out below.

## Alabama Supreme Court Opinion July 11, 1960

### PER CURIAM.

On June 30, 1958, the Supreme Court of the United States (357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488) reversed the judgment of this Court (265 Ala. 349, 91 So.2d 214) sustaining a judgment for civil contempt rendered by the Circuit Court of Montgomery County against petitioner. After remandment, this Court re-

affirmed the judgment of the Circuit Court upon the premise that notwithstanding the Supreme Court of the United States had adjudged that petitioner was not in contempt for failure to furnish its list of membership in Alabama, the petitioner was still in contempt for failure to comply with the judgment of the trial court in other respects. This was undoubtedly the record before us which we had under review. Again, the

petitioner carried the case to the Supreme Court of the United States to review our said judgment and decision in 268 Ala. 531, 109 So.2d 138.

*[Supreme Court's Decision]*

In its opinion of June 8, 1959, *National Advancement For The Colored People v. Alabama ex rel. Patterson*, 360 U.S. 240, 79 S.Ct. 1001, 1003, 3 L.Ed.2d 1205, the Federal Supreme Court said:

"We have reviewed the petition, the response of the State and all of the briefs and the record filed here in the former proceedings. Petitioner there claimed that it had satisfactorily complied with the production order, except as to its membership lists, and this the State did not deny. \* \* \* The State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. On the contrary, the State on this phase of the case relied entirely on petitioner's refusal to furnish the 'records of its membership.' That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. That was the view of the record which underlay this Court's conclusion that petitioner had 'apparently complied satisfactorily with the production order, except for the membership lists,' 357 U.S. at page 465, 78 S.Ct. at page 1173. And that was the premise on which the Court disposed of the case. The State plainly accepted this view of the issue presented by the record and by its argument on it, for it did not seek a rehearing or suggest a clarification or correction of our opinion in that regard.

"\* \* \* The State is bound by its previously taken position, namely, that decision of the sole question regarding the membership lists is dispositive of the whole case.

"\* \* \* Petitioner was, as the Supreme Court of Alabama held, obliged to produce the items included in the Circuit Court's order. It having claimed here its satisfactory compliance with the order, except as to its membership lists, and the State having not denied this claim, it was taken as true.

"\* \* \* Upon further proceedings in the Circuit Court, if it appears that further production is necessary, that court may, of course, require the petitioner to produce such further items, not inconsistent with this and our earlier opinion, that may be appropriate, reasonable and constitutional under the circumstances then appearing."

*[Reason for Second Affirmance]*

As stated, this was not the status of the record before us, nor was the appeal here tried on any such basis; hence, our second affirmance of the judgment before us.

From the foregoing, we understand that the Supreme Court of the United States based its decision on the assumption that petitioner had complied with the production order in all respects except as to membership lists, but, we further understand that the Court did not find as a fact that the production order had been so complied with. On the contrary, the last opinion of that Court appears to leave the question of compliance, except as to membership lists, to be determined by the circuit court.

We will, therefore, even though we disagree with the conclusions reached by the Federal Supreme Court, remand the cause to the Circuit Court with directions to undertake such proceedings as may be deemed proper.

The temporary injunction heretofore issued by the Circuit Court will remain in full force and effect pending final determination of the cause on its merits.

Remanded with directions.

All the Justices concur.

## U. S. District Court Opinion August 11, 1960

### MEMORANDUM OPINION

This is an action by the National Association for the Advancement of Colored People, a Corporation, seeking to invoke the jurisdiction of this Court on the ground that plaintiff-corporation has a right in this Court to redress the

deprivation, under color of the law of the State of Alabama, or custom, or usage by the officials of the State of Alabama, of a right, privilege or immunity secured to said corporation and/or its members by the Constitution of the United States and/or Acts of Congress providing for

equal rights of citizens. Plaintiff-corporation further says it is entitled to equal rights and protection under the law under the Civil Rights Act,<sup>1</sup> and that this Court has jurisdiction to redress such deprivation.<sup>2</sup>

This action was filed on June 23, 1960, and jointly therewith plaintiff sought of this Court a temporary restraining order, restraining the defendant MacDonald Gallion, as Attorney General for the State of Alabama, and his agents, etc., and restraining Mrs. Bettye Frink, as Secretary of State for the State of Alabama and her agents, etc., from refusing to register the plaintiff-corporation, said refusal action being pursuant to the temporary restraining order and injunction that was issued on or about June 1, 1956, by one of the circuit judges of the Fifteenth Judicial Circuit for the State of Alabama; said injunction enjoining plaintiff and its members from engaging in any activities in the State of Alabama. Plaintiff's motion for a temporary restraining order was denied by this Court on June 24, 1960. The motion of the plaintiff for a preliminary injunction filed contemporaneously with the complaint and the amended motion of the defendants, seeking to have this Court dismiss this action, are pending and are now submitted upon the pleadings, together with the exhibits attached thereto, the briefs and the arguments of counsel.

#### [History of The Action]

The history of this action as recited by the complaint reflects that on June 1, 1956, the then Attorney General for the State of Alabama secured a temporary restraining order from one of the circuit judges of the Montgomery County Circuit Court. Prior to the time there was any hearing on the motions in the case, the plaintiff-corporation was adjudged guilty of contempt of court for failure to comply with one of that court's production orders. Plaintiff says that because of the substantive law of the State of Alabama—which plaintiff claims is itself a denial of due process—no action could be taken on the motions in that case until plaintiff had purged itself of contempt of court. Plaintiff sought certiorari to the Supreme Court of the State of Alabama,<sup>3</sup> but without obtaining relief, and ap-

pealed to the Supreme Court of the United States,<sup>4</sup> which reversed the action of the State court insofar as the contempt proceedings were concerned, the Supreme Court of the United States saying, in effect, that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Fourteenth Amendment to the Constitution of the United States and that for the State court to compel production (of its list of members) would likely constitute an effective restraint on its members' freedom of association. The case was remanded to the Supreme Court of the State of Alabama. The Supreme Court of Alabama reinstated the contempt judgment and fine on the ground that plaintiff had failed to comply with the order of the circuit court in certain respects not considered by the Supreme Court of the United States.<sup>5</sup> A second review by the Supreme Court of the United States<sup>6</sup> resulted in the Alabama court again being reversed and the case again being remanded, with the Supreme Court of the United States denying the plaintiff-corporation's petition for mandamus to the Alabama Supreme Court. In remanding this case the second time, the Supreme Court said:

"We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U.S., at 466-467, and, therefore, deny petitioner's application in No. 674, Misc., for a writ of mandamus." (Emphasis supplied.)

The plaintiff-corporation now says to this Court that it has filed several motions to remand this case to the Circuit Court of Montgomery County so that it may be heard on the motions in that case and that the last mandate from the Supreme Court of the United States was mailed to the Alabama Supreme Court on July 14, 1959. Plaintiff-corporation says, further, no action has been taken and that since it cannot obtain a hearing on the motions in that case, the plaintiff-corporation is effectively deprived of rights, privileges and immunities under the Constitution and laws of the United States and such a denial

1. Title 42, § 1981, U.S.C.

2. Title 42, § 1983, U.S.C.

3. *Ex Parte National Assn. for Adv. of Colored People*, 265 Ala. 349, 91 So. 2d 214, and *Ex Parte National Assn. for Adv. of Colored People*, 265 Ala. 699, 91 So. 2d 221.

4. *National Assn. for Adv. of Colored People v. Alabama*, 1958, 357 U.S. 449.

5. *Ex Parte National Assn. for Adv. of Colored People*, 109 So. 2d 138.

6. *National Assn. for Adv. of Colored People v. Alabama*, 360 U.S. 240.

is a deprivation of due process of law. The amended motion to dismiss, together with the exhibit thereto, reflects that the Supreme Court for the State of Alabama on July 11, 1960 (two days before the present submission) remanded the case to the Circuit Court, Fifteenth Judicial Circuit, Montgomery County, Alabama, "with directions to undertake such proceedings as may be deemed proper."

[No Serious Question of Jurisdiction]

Contrary to the position taken by the defendants in this case, there is no serious question as to the jurisdiction of this Court to entertain this suit. The United States district courts have the jurisdiction to entertain all suits brought by citizens to redress deprivation of rights, privileges or immunities granted to them under the Constitution or the laws of the United States.<sup>7</sup> The only serious legal question in this case is whether this Court should, under the circumstances, exercise this jurisdiction.

Ordinarily, under facts and circumstances similar to those presented in this case, this Court would merely stay this proceeding and retain jurisdiction pending a reasonably prompt determination of the matter by the courts of the State of Alabama.<sup>8</sup> However, the past history of this litigation, hereinabove reviewed by this Court, removes this case from that category dealt with by the Supreme Court of the United States in the "retention" and "abstention" cases.

For the reasons hereinafter set out, it is felt that such jurisdiction and authority should not be exercised in this instance and that the action should be dismissed.

The real basis for plaintiff's seeking this Court's aid is the alleged unconstitutional action by the courts of Alabama in not proceeding promptly; that the effect of the delayed action and "dilatatory tactics" is to deprive the plaintiff-corporation of its constitutional right to do business in the State of Alabama and to do so without the plaintiff-corporation having the right to obtain rulings upon and, if necessary, a review of those rulings upon the several constitutional issues raised.

7. See this Court's opinion in *Browder v. City of Montgomery, Alabama*, 1958, D.C. Ala., 148 F. Supp. 127, and the authorities therein cited.

8. *Harrison v. N.A.A.C.P.*, 360 U.S. 167; *Louisiana P. & L. Co. v. Thibodaux City*, 360 U.S. 25, and *County of Allegheny v. Mashuda Co., et al.*, 360 U.S. 185.

It should be noted that in this case the Supreme Court of the United States refused to pass on the constitutional issues raised by this plaintiff-corporation. The Court there said that the constitutional issues were not properly before it, and remanded the case to the state courts for "further proceedings." *N.A.A.C.P. v. Alabama*, supra. In making this determination, the Supreme Court recognized that the "ultimate aim and purpose of the litigation is to determine the right of the State to enjoin petitioners from doing business in Alabama."

[Supreme Court Indicated Route]

It should also be noted that the Supreme Court in its last treatment of this litigation even went so far as to indicate to this plaintiff-corporation the route open to it in securing a prompt trial and review if appropriate.

This clear indication is found in the Court's statement above quoted on page 3 of this opinion.

If this assumption as made by the Supreme Court was or is erroneous, the proper remedy in this particular case is to that Court by regular appellate procedures or extraordinary procedure ancillary to the prior remand.

In addition to the above, it must be recognized that there are certain instances when a federal court should not exercise its jurisdiction, and this is particularly true in a case where an action is in the breast of a state court and one of the litigants in that case seeks to invoke the injunctive powers of the federal court. *Stefanelli v. Minard*, 342 U.S. 117, and the authorities therein cited.

This Court must and does now assume that the public officials for the State of Alabama (the judicial officers concerned with the case now pending in the state courts, as well as the two officers that are parties to the present litigation) recognize that they are just as solemnly committed by their oaths taken pursuant to Article VI, Clause 3, of the Constitution of the United States, to protect the constitutional rights of all citizens, as is this Court. It would be necessary for this Court to assume otherwise in order to justify granting plaintiff the relief it seeks.

For the foregoing reasons, the N.A.A.C.P.'s motion for an injunction will be denied and the amended motion to dismiss by the State of Alabama officials will be granted. A formal order will be entered accordingly.

Done, this the 11th day of August, 1960.



### ORDER AND JUDGMENT

This cause is now submitted upon the motion of the plaintiff seeking to have this Court restrain and enjoin the Attorney General of the State of Alabama and the Secretary of State of Alabama, and is also submitted upon the amended motion to dismiss filed herein by the defendants on July 13, 1960.

Upon said submission, for the reasons set forth in the opinion of this Court made and filed herein on this date, and for good cause shown, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of the plaintiff for an injunction restraining the Attorney General of the State of Alabama and the

Secretary of State of Alabama from proceeding under the temporary restraining order and injunction, barring plaintiff and its members from engaging in any activities in the State, issued by the Circuit Judge of the Fifteenth Judicial Circuit, and from refusing to register plaintiff pursuant to said temporary restraining order, be and the same is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion of the defendants to dismiss this action be and the same is hereby granted.

It is further ORDERED that the costs incurred in this proceeding be and the same are hereby taxed against the plaintiff, for which execution may issue.

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### ORGANIZATIONS NAACP—Florida

#### FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE v. Theodore R. GIBSON. FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE v. Edward T. GRAHAM.

Circuit Court of the 2nd Judicial Circuit in and for Leon County, Florida, in Chancery, August 30, 1960, Nos. 16820, 16821.

**SUMMARY:** A 1957 Florida statute authorized the appointment of a legislative committee to investigate "organizations advocating violence or a course of conduct which would constitute a violation of the laws of Florida." 3 Race Rel. L. Rep. 784 (1958). The committee served an officer of the NAACP with a subpoena to produce information pertaining to the NAACP and the Florida Council for Human Relations. He moved to quash subpoena, but the circuit court refused, which order was sustained by the district court of appeal and the Supreme Court of Florida. It was held that the issuance of the subpoena was within the committee's jurisdiction, and that the inquiry did not infringe any of his constitutional rights. *In re Petition of Graham*, 104 So.2d 16, 3 Race Rel. L. Rep. 724 (Fla. 1958). Early in 1958, the committee subpoenaed persons alleged to be officials and members of the NAACP's Miami branch to produce membership lists and to appear at a hearing on certain specified matters. Those summoned declined to produce membership records, and some individuals refused to answer certain questions as to their membership in, and acquaintance with alleged members of, the Communist Party. A state circuit court ordered the witnesses to produce the records and to answer the questions, (except those objected to on the ground of self-incrimination). On appeal, the Florida Supreme Court reaffirmed the constitutionality of the Act and held that the investigation had been legitimately focused on sedition directed exclusively against the state and on the need for constitutional amendment. It was further held that: (1) constitutional protections against self-incrimination could be invoked, since Florida anti-sedition penal statutes were still in force; (2) the requirement that a witness in a legislative investigation hearing be informed in advance as to the nature of the inquiry had been met; (3) all questions propounded were pertinent except those wherein witnesses had been asked if they knew named persons without any attempt having

been made to relate those names to a proper subject of the inquiry; (4) witnesses could be required to answer questions about personal connections with the NAACP and to produce NAACP records for certain limited uses, absent evidence that the disclosure of NAACP membership in Florida would deter members from participating in NAACP affairs for fear of retaliation or would be used to try to oust the organization from the state. The judgments were affirmed, except as modification was required as to questions not shown to be pertinent to the committee's inquiry. 108 So.2d 729, 4 Race Rel. L. Rep. 143 (Fla. 1958). Under a subsequent circuit court order to bring before the committee a membership list of the Dade County NAACP Chapter "for the purpose of consulting the same in answering lawful and pertinent questions propounded to him," the present chapter president, one of the persons subpoenaed by the Committee in 1958, appeared before the Committee but refused again to bring the list. After a hearing on an order to show cause, the court found that the respondent had not stated any sufficient claim or privilege in law or in fact for refusing to bring the list, whereupon it adjudged him to be in direct and criminal contempt of court and sentenced him to a jail term and a fine. Under a similar order to appear and answer specified questions concerning personal membership and knowledge of membership of other named persons in the Dade County NAACP chapter, and "all other lawfully pertinent questions" propounded by the Committee, a past chapter president, another of the persons subpoenaed in 1958, appeared but again refused to answer the questions. The court found this respondent guilty of contempt on the same basis and passed the same sentence upon him.

## Order of July 19 in Gibson Case

WALKER, Judge.

This cause coming on to be heard upon the petition for Rule to Show Cause, the Rule to Show Cause, and the respondent's Return thereto, and the Court having taken testimony and having heard fully from the counsel for both parties and having considered the memorandum submitted by counsel for both parties, and the Court being fully advised in the premises, finds:

(1) There is no competent believable evidence before the Court showing any substantial risk of a deterrent effect which could reasonably be anticipated to result from a disclosure of association with the National Association For The Advancement Of Colored People.

(2) The facts and circumstances of the proceeding at bar are such that the interest of the State is so grave, pressing, and compelling that the interest of the individual respondent should yield to the public interest or to the essential requirements of the welfare of the State and he should respond to the subpoena duces tecum and the orders of the Committee and produce before the Committee the membership list of the Dade County branch of the National Association For The Advancement Of Colored People for the purpose of consulting the said list and answering pertinent and appropriate questions, even if the record did show a substantial

risk of a deterrent effect which could be reasonably anticipated to result from a disclosure of association with the National Association For The Advancement Of Colored People.

(3) The record clearly demonstrates and the case of Gibson vs Florida Legislative Investigation Committee, Florida 108 So 2d 729, makes it clear that the production of said list and the consultation of the same for the purpose of answering pertinent and lawful questions is material to the subject matter under inquiry and was so demonstrated and the respondent's refusal to produce said list and consult the same is without privilege, justification, or authority in law.

(4) Chapter 59-207 Laws of Florida 1959, establishing the Committee, is constitutional. Accordingly, upon consideration, it is,

ORDERED, ADJUDGED AND DECREED that the respondent, Theodore R. Gibson, is hereby directed and ordered to be and appear before the Legislative Investigation Committee of the Florida Legislature in House Committee Room 49 of the State Capitol Building at Tallahassee, Florida, at 10:00 o'clock A.M., July 27, A. D., 1960 and then and there to produce before the said Committee the membership list of the Dade County branch of the National Association For The Advancement Of Colored People

and then and there refer to such records and answer any question or inquiry regarding any individual whose association with the National Association For The Advancement Of Colored People is shown to be pertinent to the inquiry, or other pertinent questions with reference

thereto as authorized and approved in the case of Gibson vs Florida Legislative Investigation Committee, supra, and upon his failure to do so, he shall be deemed, held, and constituted guilty of a direct and criminal contempt of this Court and punished accordingly.

## Order of August 30 in Graham Case

This cause coming on to be heard on this Court's order to show cause issued August 15, 1960, and the respondent's return thereto, and there being before the Court the respondent Edward T. Graham and his counsel Tobias Simon and Howard W. Dixon and Mark R. Hawes representing the Florida Legislative Investigation Committee, and the Court having heard fully from the counsel for both sides and having thoroughly considered all argument together with the petition for the rule to show cause and the exhibits thereto attached, and the Court being fully advised in the premises, finds as follows:

That on July 19, 1960, this Court entered its order, previously orally announced on July 12, 1960, requiring the respondent Edward T. Graham to appear before the petitioner Committee on July 27, 1960, then and there to answer the following specific questions:

- (1) "Are you presently a member of the NAACP?"
- (2) "• • Reverend, now, do you know, or have you, in the past five or six years, known a person named Augusta Birnberg, of Dade County, to be a member of the NAACP in Dade County?"
- (3) "Now, Reverend, I ask you if you do now, or have in the past, known a man named Edward Waller, as a member of the NAACP in Dade County • •"
- (4) "Did you know James Nimmo, Abe Sorkin, Charles Marks, Myron Marks, Leo Sheiner, Charles Smolikoff, Tess Kantor, Leah Adler Benomovsky, Louis Popps, Manny Graff, Bobbie Graff or Michael Shantzek, or any of them to be members of the NAACP in Dade County?"

as well as all other lawfully pertinent questions propounded by the plaintiff Committee; or upon his failure to do so that he be held and deemed guilty of direct and criminal contempt of this Court and punished accordingly.

The Court further finds that the respondent Edward T. Graham did appear before the petitioner Committee on July 27, 1960, as ordered by the Court but that the said respondent willfully failed, refused and neglected to answer each and every of said questions above set out as well as other questions, some of which the Court has determined to be pertinent, without stating any sufficient claim or privilege in law or in fact for the refusal so to testify in answer to said questions, and the respondent Edward T. Graham saying or offering nothing that would lawfully preclude the Court from entering its adjudication of guilt and pronouncement of sentence of the law

NOW, THEREFORE, it is the order and judgment of this Court that the said respondent Edward T. Graham is in direct and criminal contempt of this Court; it is further the judgment of the Court and the sentence of the law that you, Edward T. Graham, for your said contempt, be incarcerated in the Leon County Jail for a period of six (6) months and in addition thereto that you pay and forfeit to the state of Florida for the benefit and use of Leon County a fine in the amount of Twelve Hundred Dollars (\$1,200.00), and upon failure to pay said fine that you serve an additional period of six months in the Leon County Jail.

DONE AND ORDERED in Open Court at Tallahassee, Leon County, Florida, this 30th day of August, 1960.

/s/ W. May Walker  
Circuit Judge

This cause coming on to be heard on this Court's order to show cause issued August 15, 1960, and the respondent's return thereto, and there being before the Court the respondent Theodore R. Gibson, and his counsel Robert L. Carter, Frank D. Reeves and Grattan E. Graves, Jr., and Mark R. Hawes representing the Florida Legislative Investigation Committee, and the Court having heard fully from the counsel for both sides and having thoroughly

considered all argument together with the petition for the rule to show cause and the exhibits thereto attached, and the Court being fully advised in the premises, finds as follows:

That on July 19, 1960, this Court entered its order, previously orally announced, on July 12, 1960, requiring the respondent Theodore R. Gibson to appear before the petitioner Committee on July 27, 1960, and then and there bring and have with him the membership list of the Dade County Chapter of the NAACP for the purpose of consulting the same in answering lawful and pertinent questions propounded to him; or upon his failure to do so that he be held and deemed guilty of direct and criminal contempt of this Court and punished accordingly.

The Court further finds that the respondent Theodore R. Gibson did appear before the petitioner Committee on July 27, 1960, as ordered by the Court but that the said respondent wilfully failed, refused and neglected to bring and have with him and to consult for the purpose of answering lawful and pertinent questions the said membership list, without stating

any sufficient claim or privilege in law or in fact for his refusal to have said list with him for the said purpose, and the respondent Theodore R. Gibson saying or offering nothing that would lawfully preclude the Court from entering its adjudication of guilt and pronouncement of sentence of the law.

NOW, THEREFORE, it is the order and judgment of this Court that the said respondent Theodore R. Gibson is in direct and criminal contempt of this Court; it is further the judgment of the Court and the sentence of the law that you, Theodore R. Gibson, for your said contempt, be incarcerated in the Leon County Jail for a period of six (6) months and in addition thereto that you pay and forfeit to the state of Florida for the benefit and use of Leon County a fine in the amount of Twelve Hundred Dollars (\$1,200.00), and upon failure to pay said fine that you serve an additional period of six months in the Leon County Jail.

DONE AND ORDERED in Open Court at Tallahassee, Leon County, Florida, this 30th day of August, 1960.

## ORGANIZATIONS

### NAACP—Virginia

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al. v. COMMITTEE ON OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE et al.**

Supreme Court of Appeals of Virginia, June 13, 1960, 114 S.E.2d 721.

**SUMMARY:** The National Association for the Advancement of Colored People sought to enjoin the Virginia legislative Committee on Offenses Against the Administration of Justice from conducting certain phases of an investigation of NAACP activities in the state. The recovery of records in the hands of the committee was also sought. The trial court dismissed the bill. On appeal, the Virginia Supreme Court of Appeals affirmed, holding that appellants were not threatened with irreparable injury so as to justify an injunction, that the trial court did not have authority to require the committee to produce records, but that the trial court did have authority to dismiss the bill. The court rejected the NAACP's contention that the question was moot because the committee had passed out of existence. See also 3 Race Rel. L. Rep. 260 (1958).

SNEAD, J.

Appellants, National Association for the Advancement of Colored People, a corporation, hereinafter referred to as "NAACP", and the Virginia State Conference of National Association

for the Advancement of Colored People Branches, an unincorporated association affiliated with NAACP, were awarded an appeal from a decree entered May 19, 1959, which dismissed their bill of complaint exhibited against the Committee on Offenses Against the Administration



of Justice, its individual members and clerk, appellees, hereinafter referred to as "Committee", created pursuant to Chapter 373, Acts of Assembly 1958. Sections 3, 4, 5 and 6 thereof are printed in the margin.<sup>1</sup>

In their bill, complainants prayed for discovery of certain records in possession of the

1. "§ 3. The Joint Committee may hold hearings anywhere in the State. The Chairman of the Committee, or any member acting at his direction shall have authority to issue subpoenas, which may be served by any sheriff or sergeant of this State, or by any agent or investigator of the Committee, all with return shown thereon, requiring the attendance of witnesses, the production of books, records, photographs and other writings, or both. The Committee also may compel the attendance of witnesses and the production of books, records, photographs and other writings by motion made before the circuit or corporation court having jurisdiction of the person whose attendance or of whom production is sought. The court upon such motion shall issue such subpoenas, writs, processes or orders as the court deems necessary. If any person, firm, corporation, association or other organization (hereinafter severally referred to as 'persons') fails to appear in response to any subpoena as thereby required, or any person fails or refuses, without legal cause, to answer any question propounded to him or fails or refuses to produce writings or, upon his appearance pursuant to a subpoena behaves in a disorderly manner, then upon the application by the Chairman, or by any member of the Committee acting at his direction, or by its counsel, to the circuit or corporation court of the county or city wherein such person resides or may be found, such court shall issue an order directing its clerk to issue a rule against such person to show cause why he should not be punished for contempt by reason of his failure to so appear, testify, produce writings or because of such disorderly behavior. The Chairman of the Committee, or any member acting at his direction, shall be authorized to administer oaths to witnesses.

"§ 4. The Joint Committee or any one or more members thereof, when acting pursuant to written direction of a majority of the Committee, may take the deposition of any witness, within or without the State, who is thought to possess information germane to the matters under investigation. The testimony of any such witness within the State may be taken pursuant to a subpoena issued by the Committee or by the clerk of the circuit or corporation court having jurisdiction of the person of such witness; and the testimony of a witness without the State shall be taken in compliance with §§ 8-305 and 8-306 insofar as practicable. Any such deposition taken by less than a quorum of the Committee shall be as valid as if taken by a quorum.

"§ 5. The Joint Committee may file interrogatories in the clerk's office of the circuit or corporation court having jurisdiction of the person from whom answers are sought. Upon such filing, the clerk shall issue a summons, directed as prescribed in § 8-44 requiring the sheriff or sergeant to summon the person to answer such interrogatories, and make return thereof within such time, not exceeding sixty days, as may be prescribed in the summons. With the summons there shall be a copy of the interrogatories, which shall be delivered to the per-

Committee. They also prayed that the Committee and their successors in office be enjoined and restrained from "(1) in anywise enforcing, executing or proceeding against complainants, their affiliates, officers, members, contributors, voluntary workers, and attorneys associated with the conduct of the program of the complainants, or any of them, under the provisions of Section 6 of Chapter 373, Acts of the General Assembly of Virginia, 1958 session, and from (2) in anywise enforcing, executing or proceeding under any provision of Chapter 373 \* \* \* in such manner as to compel, through the use of compulsory process, (a) disclosure of the names or other

son served with the summons at the time of service. The Committee may also issue, have served, and require answers to interrogatories.

"§ 6. The Joint Committee, or any member thereof when acting pursuant to its direction, may sue out an attachment for any book, record, photograph or other writing in the possession or subject to the control of any person in the circuit or corporation court of the county or city having jurisdiction of such person. Proceedings for an attachment hereunder shall be initiated by a sworn petition which shall describe such writings with reasonable certainty and shall state the grounds on which the attachment is sought. It shall be sufficient ground for an attachment if it appears from the petition that the person named therein is destroying, removing or concealing, or is about to destroy, remove or conceal, or that it is believed that, if otherwise proceeded against, such person will destroy, remove or conceal such writings to avoid their production.

"Upon the filing of the petition, the clerk before whom the petition is filed shall issue an attachment in accordance with its prayer. Such attachment shall be directed to the sheriff or sergeant of the county or city and shall be returnable before the court out of which it was issued, or the judge thereof in vacation, not more than thirty days from the date of service. Such attachment shall command the officer to whom it may be directed to attach the writings described therein and to keep the same safely in his possession until further order of the court.

"Any proceeding by the person in possession or control of such writings to quash an attachment shall be by motion to the court from which the attachment issued. Such motion shall be verified by affidavit and shall recite with particularity its grounds. The motion shall be filed not more than seven days after the attachment shall have been levied. Pending the court's decision on a motion to quash such attachment, and in no event earlier than seven days after its levy, the writings shall not be examined by the Joint Committee, but shall remain under the control of the court."

Note: Section 6 (Code § 30-47) has been amended and reenacted by Chapter 39, Acts of Assembly 1959, Ex. Sess., to provide for the sealing of property attached by the officer and to be returned forthwith by him to the custody of the court, and to permit an inspection of writings by the person formerly in possession during the seven day period after levy upon satisfying the court that the examination is necessary to prevent undue hardship.

information leading to the identity of any member, contributor, voluntary worker or associate of the complainants, or of any person who has requested of or received from the complainants assistance in any matter, case or proceeding involving an issue of racial segregation or discrimination, or (b) explanation for, or discussion of, any person's belief or his advocacy of, or participation in, or donation of support for litigation to vindicate rights and privileges secured by the Constitution and laws of the United States."

#### [Motion to Remove]

The bill was filed on November 18, 1958, in the Law and Equity Court of the City of Richmond. On December 2, 1958, appellees filed a motion to remove the cause to the Circuit Court of the City of Richmond on the grounds that exclusive jurisdiction of the cause was vested in the Circuit Court, and there was pending in that court proceedings between the same litigants in which the issues raised in this proceeding might be fully and finally determined. Over objections of appellants the Law and Equity Court granted the motion and ordered the cause removed. On December 5, 1958, the Circuit Court ordered the suit docketed and proceeded with as if it had been originally instituted there. On the same day appellants filed their motion in the Circuit Court to remove the cause to one of the courts in the city of Richmond having general equity jurisdiction, contending that the cause was not one within the limited and exclusive statutory jurisdiction of the Circuit Court of the City of Richmond. Following the order of December 18, 1958, overruling that motion, appellees on the same day filed a motion to dismiss the bill.

The grounds alleged in support of the motion were: (a) Appellants were in no way threatened with imminent and irreparable injury. (b) Adequate remedies at law were available to appellants. (c) Except for published reports of legislative committees created under Chapters 34 and 37, Acts of Assembly 1956, Ex. Sess., which are public documents, the transcripts of proceedings before, and the records of, such legislative committees are the sole property of the Committee, are privileged, private in nature, and are not subject to disclosure. (d) The suit was brought in bad faith and only for the purpose of hindering appellees in the performance of their proper duties.

On March 20, 1959, the day set for argument on appellees' motion to dismiss the bill, appellants filed a motion to reject and strike it. For their grounds they asserted the paper writing according to its substance was not a plea, demurrer or answer, and was therefore not a pleading cognizable in the chancery courts of this Commonwealth. After hearing argument, the motion to reject was overruled.

#### [Evidence Heard]

Over appellants' objections the court proceeded to hear evidence *ore tenus* with regard to appellees' motion to dismiss. Succinctly stated, the testimony and exhibits show, among other things, that the records sought by appellants relate not only to investigations of NAACP and its affiliates, but also to investigations made of other unrelated persons and organizations; that of the many groups investigated only NAACP and its affiliates had declined to furnish all information requested; that the rules adopted by the Committee provide that its records shall not be released without the approval of the Committee; that the only action taken by the Committee was in the nature of interrogatories; that transcripts of testimony of witnesses which NAACP and its affiliates requested were made available to them, and that reports made to the General Assembly by the Committee's predecessors, created by Chapters 34 and 37, Acts of Assembly 1956, Ex. Sess., were matters of public record and had been seen by counsel for appellants. Oral argument was heard and written memoranda were later submitted. By its decree of May 19, 1959, the court sustained the motion and dismissed the bill.

The decree incorporated the court's letter opinion of April 30, 1959, which found, *inter alia*, that the motion to dismiss was permitted under Virginia law; that the records of the Committee were privileged and the court was without authority to require a disclosure of them; that there had been no showing that appellants were threatened with imminent injury, and that they had not brought their case within the rules of law which would justify the granting of injunctive relief.

#### [Suggestion of Mootness]

During oral argument of the case in this Court counsel for appellants suggested that the case was now moot because Chapter 373, under

which the Committee was created, had expired and the powers of the Committee had lapsed. Since this point had not been discussed in the briefs, we requested counsel to file memoranda in support of their respective views, which was done.

Chapter 373, § 1(a) directs the Committee to "investigate and determine the extent and manner in which the laws of the Commonwealth relating to the administration of justice are being observed, administered and enforced" and specifically directs "its attention to the observance and to the methods and means of administration and enforcement of those laws, whether statutory or common law, relating to champerty, maintenance, barratry, running and capping and other offenses of any other nature relating to the promotion or support of litigation by persons who are not parties thereto." Section 1(b) directs the Committee's attention to the manner in which the laws of the Commonwealth relating to taxes are being observed and enforced with respect to persons, corporations and associations who do, or seek to promote or support litigation to which they are not parties.

Section 1(c) provides that the "Joint Committee" shall be composed of seven members to be selected from the Courts of Justice Committees of the House of Delegates and the Senate. Four shall be appointed by the Speaker of the House of Delegates and three by the President of the Senate. It further provides: "Members shall serve on the Committee during the effective period of this act; the presiding officer of each House to have the power to fill vacancies occurring on the Committee."

Section 10 provides: "• • • [N]ot later than sixty days preceding the next regular session of the General Assembly, it [Committee] shall make a written report to the General Assembly, upon the observance, administration and method of enforcement of said common and statutory laws, and shall set forth in its report its findings and recommendations and drafts of any amendatory legislation the Committee deems desirable."

Appellants point to language employed in Section 1(c), *supra*, which reads: "Members shall serve on the Committee during the effective period of this Act • • •" They argue that the requirement in Section 10, *supra*, that the Committee make a written report to the General Assembly not later than sixty days preceding the next regular session setting forth its findings and recommendations and any drafts of legis-

lation deemed advisable affords a "clue" as to what the General Assembly intended as the effective period of the Act. We observe Section 10 directs that the Committee make "a" written report not later than the designated time, but does not exclude later reports.

#### [Provisions of Chapter 34]

Chapter 34, Acts of Assembly 1956, Ex. Sess., which established the original Committee on Offenses Against the Administration of Justice, provided: "This act shall be effective until the convening of the next regular session of the General Assembly." Consequently, it expired upon the happening of that event. Chapter 37, also enacted at the 1956 Extra Session, contained no express provision limiting its duration. It was expressly repealed by Chapter 373, which contains no express provision limiting its duration. There has been no express repeal of Chapter 373. On the contrary the acceptance by the 1960 General Assembly of the Committee's report, which stated the work of the Committee "needs to be pursued vigorously" and that it was considered "essential" that the Committee further investigate, is noteworthy. Moreover, the Act, which was regularly passed, has been codified as §§ 30-42 through 30-51 in the official State code, and three vacancies on the Committee were filled by the appointive powers after the adjournment of the 1960 Session of the General Assembly and before the suggestion was made that the case was moot. It is manifest that the General Assembly did not intend to limit the effective life of Chapter 373.

It was contended in *Ex Parte Johnson*, 187 S.C. 1, 196 S.E. 164, that a joint resolution adopted by the General Assembly of South Carolina which established a joint legislative committee to investigate law enforcement agencies in that State had expired by limitation and that the powers of the Committee had terminated, because the Committee had not made its final report within the time designated in the resolution. It provided that the Committee "shall report to the General Assembly not later than February 15th at the next regular session of the legislature." The court observed that the joint resolution did not contain any stipulation, either expressly or by implication that the failure to file such a report would *ipso facto* end the powers of the Committee and said: "Indeed, it is too obvious for extended discussion that this provision of the resolution in question was direc-

tory only, and that the authority of the committee continues unless and until some further action on the part of the General Assembly is taken."

It will be noted that the South Carolina committee was created by a joint resolution, which is not a law, whereas the Committee in the present case was established by statute.

In 50 Am. Jur., Statutes, § 513, p. 524, it is stated:

"*Generally.*—All acts not in terms limited in their operation to a particular term of time are in legal contemplation perpetual; that is, they continue in force until duly altered or repealed by competent authority. It was long ago settled that an act of Parliament cannot be repealed by nonuser. This rule is in accord with reason and has been accepted in the United States, where it has been held that the fact that a statute has remained unenforced for a long period of time does not render it inoperative. In this respect, the general rule is that a statute cannot be terminated by means other than an express provision of subsequent law or necessary implication therefrom, or an express provision in the repealing act itself for its termination by some act other than a repealing statute, or a subsequent constitutional provision." See *Wellington et al., Petitioners*, 16 Pick. (33 Mass.) 87, 26 Am. Dec. 631, 640.

The Act by its terms does not limit its operation to a particular period of time and it has not been terminated by subsequent Acts of the General Assembly or by a constitutional provision. We hold that Chapter 373 is presently effective and will remain so until it has been duly altered or repealed.

We turn now to the other questions involved on this appeal. They are: Whether the Circuit Court of the City of Richmond had jurisdiction to entertain this suit; whether the trial court had authority to consider and grant appellees' motion to dismiss the bill of complaint; whether the trial court had authority to compel the Committee to produce its private records, and whether the bill of complaint stated a case which would justify injunctive relief.

Appellants contend that the Circuit Court of the City of Richmond was without jurisdiction to entertain this cause. The pertinent sections of Code 1950, follows:

Section 8-38. "*Venue generally.*—Any action at law or suit in equity, except where it is otherwise especially provided, may be brought in any county or corporation:

"(9) If it be an action or a suit in which it is necessary or proper to make any of the following public officers a party defendant, to-wit, the Governor, Attorney General, State Treasurer, Secretary of the Commonwealth, Comptroller, Superintendent of Public Instruction, or Commissioner of Agriculture and Immigration; or in which it may be necessary or proper to make a party defendant the State Board of Education, or other public corporation composed of officers of government, of the funds and property of which the Commonwealth is sole owner; or in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the Commonwealth, or any execution issued on such judgment or decree, it shall be only in the city of Richmond; \* \* \*."

Section 8-40. "*In what courts, actions or suits may be brought.*—Any action or suit mentioned in either of the two preceding sections may be in a circuit court of any county, or circuit or corporation court of any city, wherein it is allowed or required thereby to be brought; except that any such action or suit as is allowed by paragraph (8) of § 8-38, or required by paragraph (9) of such section, to be brought in the city of Richmond, shall be in the Circuit Court of such city. And if any such action or suit as is mentioned in such paragraph (9) is brought in any other court than the Circuit Court of the city of Richmond, it shall, by order of such other court, be transferred, together with all the papers and proceedings therein, to the Circuit Court of the city of Richmond, to be proceeded in to a final decision in such Circuit Court. And if such action or suit be not so transferred, but be proceeded in to judgment or decree in the court wherein it is so pending or shall have been so brought, such judgment or decree, so far as it may be against any of the public officers or public corporations mentioned in paragraph (9) or against the Commonwealth, shall be void." (Italics supplied.)

Appellants say that appellees do not fall within the terms of § 8-38(9) because (1) the members



of the General Assembly who constitute the Committee are not expressly included among the state officers mentioned therein and may not be inferentially included; (2) the Committee does not qualify as a "public corporation composed of officers of government, of the funds and property of which the Commonwealth is sole owner", and (3) the bill mentions no judgment on behalf of the Commonwealth and none is in existence which they seek to restrain.

Appellees argue that the fundamental purpose of appellants' bill is to restrain the Committee from proceeding in such a manner as to discover activities of NAACP and its affiliates; that it is apparent that the Committee might need to proceed to judgment or decree and issue execution thereon against appellants or their representatives in order to require disclosure of such activities, and that the provision "any judgment or decree on behalf of the Commonwealth, or any execution issued on such judgment or decree" in § 8-38(9) applies to future as well as past judgments or decrees and executions issued thereon. They also contend that when §§ 8-38(9) and 8-40 are read together it is clear that the General Assembly intended that any action or suit against the Commonwealth must be brought in the Circuit Court of the City of Richmond.

In *Richmond v. Pace*, 127 Va. 274, 287, 103 S. E. 647 we said:

"A State government is an independent existence, representing the sovereignty of the people. The power of the legislature is the power of that sovereignty, and, as a general proposition, is supreme in all respects and unlimited in all matters pertaining to legitimate legislation."

This being true, it is evident that a suit against the General Assembly or its duly constituted committees is a suit against the Commonwealth.

In *Burks Pleading and Practice*, (4th ed.) p. 60, it is stated:

"\* \* \* If, on the other hand, the suit or action is against the Commonwealth, or against one of its public corporations mentioned in paragraph 9 of § 8-38, or involves as a defendant, one of its officers mentioned in that section, then, such a suit or action must be commenced in the Circuit Court of the City of Richmond." (Italics supplied.)

We said in *Bott v. Hampton Roads San. Comm.*, 190 Va. 775, 783, 58 S.E.2d 306:

"It is elementary that the intention of the General Assembly must be sought and applied when we consider the Act, and we must consider and give effect to the specific language used. In our quest for the intention we must consider the object of the legislation, the purpose to be accomplished, and so construe it as to promote the end for which it was enacted."

Applying the above principles in construing §§ 8-38(9) and 8-40, we have no difficulty in reaching the conclusion that any suit or action against the Commonwealth may be effectively maintained only in the Circuit Court of the City of Richmond. Section 8-40 specifically states that if a suit or action as provided in § 8-38(9) is brought in any court, other than the Circuit Court of the City of Richmond, and proceeded in to a final decision in such court, the "judgment or decree, so far as it may be against any of the public officers or public corporations mentioned in Paragraph (9), or against the Commonwealth, shall be void."

Appellants next contend that the trial court erred in entertaining, hearing evidence upon and granting appellees' motion to dismiss their bill. They argue that such action was a departure from the established practice in courts of equity in this Commonwealth so as to constitute a denial of due process under the Fourteenth Amendment of the Constitution of the United States. They maintain that the only proper defensive pleadings to a bill in equity are demurrer, plea, answer, and disclaimer.

We have often said that a failure to state in the bill a case justifying equitable relief, as we later determine to be the case here, is jurisdictional.

In *Catron v. Bostic*, 123 Va. 355, 360, 96 S.E. 845, it is stated:

"\* \* \* [W]henever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity is the want of jurisdiction in such case \* \* \*." See *Hagan v. Dungannon Lumber Co.*, 145 Va. 568, 575, 134 S.E. 570; *McCloud v. Va. E. & P. Co.*, 164 Va. 604, 609, 180 S.E. 299.

With regard to the manner in which objection for lack of jurisdiction may be raised, we observed in *Thacker v. Hubard & Appleby*, 122 Va. 379, 386, 94 S.E. 929:

"\* \* \* Objection for want of jurisdiction

of the subject matter may be taken by demurrer, or motion, or in any way by which the subject may be brought to the attention of the court, \* \* \*." See *Nolde Bros. v. Chalkley*, 184 Va. 553, 561, 35 S.E. 2d 827.

In *Moore v. N. & W. Ry. Co.*, 124 Va. 628, 637, 98 S.E. 635, it is said:

"\* \* \* In such cases the defense of lack of jurisdiction is a substantial defense and is in its nature a bar to the action. It is not merely a dilatory defense. It does not go merely to the venue. Hence, in such cases the defense need not be pleaded by a plea in abatement. It may be pleaded in bar, at rules or at term, or the defense may be otherwise made at term by motion to quash the process of summons or by motion to dismiss the action or suit, as may be more appropriate; and, indeed, the court should, *ex officio, mero motu*, dismiss the action or suit, upon the fact disclosing the lack of jurisdiction appearing or being made to appear of record by any method which is in accordance with the prevailing practice." (Citing cases.)

These principles apply to suits in equity as well as actions at law. Thus where jurisdiction of the subject matter is questioned, it may be accomplished by a motion to dismiss the bill. We find that the chancellor had authority to consider, hear evidence upon, and grant appellees' motion to dismiss appellants' bill of complaint, and that no constitutional provisions were thereby violated.

#### [Transcript Procedures]

Section 9 of Chapter 373 provides that all transcripts of proceedings before, and records of, the Committee on Offenses Against the Administration of Justice and the Legislative Committee, created by Chapters 34 and 37 of Acts of Assembly 1956, Ex. Sess., respectively, are subject to the inspection and use of the present Committee. Appellants prayed for discovery of those records as well as separate reports of the two former Committees, which reports the record shows are public and have been seen by counsel for appellants. They assert that a production of these papers and documents will support allegations in their bill.

The Committee maintains that the records which have not been released are private in nature, privileged and are not subject to dis-

closure as shown by Section 14 of its Rules, which reads:

"No committee records, reports or publications, or summaries thereof, shall be made or released to others without the approval of the Chairman of the Committee or a majority of its members."

The legislatures of the several states have inherent powers to appoint committees to secure necessary information to assist them in preparing and enacting needful laws. It is universally recognized that the existence of such power is essential for the efficient discharge of legislative functions. *NAACP v. Committee*, 199 Va. 665, 674, 101 S.E. 2d 631; 49 Am. Jur., States, etc., § 40, pp. 257, 258. When such a committee acts within bounds of its purposes, it acts as the legislature itself. *McGrain v. Daugherty*, 273 U.S. 135, 165, 47 S.Ct. 319, 50 A.L.R. 1, 71 L. ed. 580; *United States v. Di Carlo*, 102 F.Supp. 597, 601.

In *Wise v. Bigger*, 79 Va. 269, 281, *Wise* contended that the vote on "an act to apportion the representation of the State of Virginia in the Congress of the United States" was short of the number required for its passage and sought a writ of mandamus to require *Bigger*, Clerk of the House of Delegates and keeper of the rolls, to strike it from the rolls and to compel the superintendent of public printing to omit it from the Acts of Assembly. The records indicated a proper passage of the Act and the writ of mandamus was denied. The court said:

"To do this [to inquire into the veracity of the record], would be to violate both the letter and the spirit of the constitution; to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the legislature." See also *Clough v. Curtis*, 134 U. S. 361, 371, 10 S. Ct. 573, 33 L.Ed. 945.

*Morris v. Creel*, 2 Va. Cas. (4 Va.) 49, is a case which presented an issue somewhat analogous to the issue presented here. At that time the Constitution of Virginia provided for a Privy Council, which was called in the opinion an Executive Council, composed of eight members, chosen by joint ballot of both Houses of the Assembly, to assist in the administration of government. The Clerk of the Executive Council was served with a *subpoena duces tecum*,

by which he was commanded to attend court and bring with him certain documents. He failed to appear as directed and a rule was issued for him to show cause why an attachment should not issue for his contempt. In response to the rule he alleged, among other things: "That the Clerk of the Executive Council is not bound to attend any Court, and bring with him any paper filed in the office, upon a *subpoena duces tecum* directed to him, without an order of Council directing and authorizing him to do so." The Superior Court adjourned the question to the General Court, which rendered the following judgment:

"The Court having maturely considered the question adjourned, doth, by the unanimous opinion of the Judges present, decide, that a paper submitted to the Executive Council for the purpose of enabling it to perform its Executive functions, and filed among its papers, ought not to be withdrawn by the Clerk, without its order; and, therefore, that an Attachment ought not to be awarded."

Our question here involves only certain records of a duly constituted committee of the General Assembly, a disclosure of which is sought by appellants, and we hold that the trial court properly ruled that it was without authority on the record presented to compel a disclosure. As provided by Rule 14, *supra*, the consent of the chairman of the Committee or a majority of its members is essential for a disclosure to be compelled, unless favorable action is taken by the Joint Assembly.

#### [Sufficiency of Statement]

Finally, does appellants' bill state a case which would justify injunctive relief? Due to the extraordinary character of the injunctive remedy, the granting of such relief should be exercised sparingly and cautiously, with a full conviction of its urgent necessity. 28 Am. Jur., Injunctions, § 25, pp. 515, 516.

Appellants question the constitutionality of the Act. "The invalidity or unconstitutionality of a statute or ordinance is not of itself a ground of equity jurisdiction. A court of equity has not jurisdiction to enjoin acts only because they are attempted or threatened under color of an unconstitutional or void statute or ordinance. \* \* \* Thompson v. Smith, 155 Va. 367, 386, 154 S. E. 579.

The bill does not present a case for injunctive relief. Appellants have failed to allege any urgent necessity for the injunction requested or that action pursuant to the Act is imminent which will cause them irreparable injury.

In *Backus v. Abbot*, 136 W. Va. 891, 902, 6 S.E.2d 48, the court observed in denying the prayer for a mandatory injunction:

"The facts disclosed by the pleadings in this suit do not establish any urgent necessity for the injunctive relief sought by the plaintiffs or that such relief is necessary to prevent irreparable injury to the property which they claim; and the absence of either of these requisites deprives them of any right to relief by a mandatory injunction.  
\* \* \*

In *Cruickshank v. Bidwell*, 176 U. S. 73, 81, 20 S.Ct. 280, 44 L.Ed. 377, the court said:

"The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective." See also *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 240, 241, 73 S.Ct. 236, 97 L.Ed. 291; *Linehan v. Waterfront Commission of New York Harbor*, 116 F. Supp. 401, 404.

There is another reason why injunctive relief was not available to appellants. It would serve to invade the legislative prerogatives of the Committee. In a *per curiam* opinion rendered in *Mins. v. McCarthy*, 209 F. 2d 307 (D.C.Cir.), where a motion for leave to file a stay was denied, it was held:

"The Court is of the opinion that where a committee of the Congress has issued a subpoena ad testificandum to a witness to appear at a hearing, without defining the questions to be asked, the judicial branch of the Government should not enjoin in advance the holding of the hearing or suspend the subpoena. The rights of witnesses in respect of any question actually asked at the hearing are subject to determination in appropriate proceedings thereafter."

There are adequate remedies available to appellants in event the Committee causes process to be issued against them for the purposes set forth in Sections 3, 4, 5 and 6 of Chapter 373. They may refuse to testify and test the validity of the Act under a citation for contempt, or, as

permitted by our procedure, they may do so by a motion to quash or vacate the subpoena or attachment. See *NAACP v. Committee*, supra, page 672.

For the stated reasons, the decree appealed from is affirmed.

## PUBLIC ACCOMMODATIONS Amusement Parks—Maryland

William L. GRIFFIN et al. v. Francis J. COLLINS et al.

United States District Court, District of Maryland, August 25, 1960, 187 F. Supp. 149.

**SUMMARY:** Six Negroes brought a class action in federal court for declaratory and injunctive relief against the corporate owner-lessor and the corporate operator-lessee of an amusement park in Montgomery County, Maryland, the county sheriff, and a park guard employed by a detective agency under contract to the corporate defendants to provide a park guard force. It was stipulated that on a certain occasion the guard, acting pursuant to his commission as a special deputy sheriff of the county, arrested three of the plaintiffs for trespass, after requesting them to leave and warning them that otherwise they would be subject to such arrest. The other plaintiffs claimed they had been prevented from visiting the park by threats of arrest. It was also alleged that defendants had publicly announced their intention to maintain their policy of racial discrimination under color of law by arresting all Negroes attempting to enter or use the park, and that such statements were a part of a continuing conspiracy to maintain racial discrimination enforced by use of governmental action. Plaintiffs conceded that the corporate defendants could refuse to serve whomever they please and could use "self-help" to eject a Negro who insists on remaining on their premises after being told to leave, but argued that calling any state official to remove or arrest such a person would violate the Fourteenth Amendment equal protection and due process clauses and the civil rights statutes which forbid state-imposed racial discrimination in the field of recreational activity. The court rejected plaintiffs' contention, observing: "Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." However, the court held that the allegation of defendants' previous concerted action to appoint the guard as a special deputy sheriff and the stipulation of the guard's duty to enforce the owners' and operators' policies presented a set of facts such that the case should be heard on its merits. Also, because questions presented here would be involved in the future trial of the criminal charges in the state court, the court decided to postpone further action. The defendants' motions to dismiss and plaintiffs' motion for preliminary injunction and summary judgment were therefore denied.

THOMSEN, Chief Judge.

This is a class action to prevent the arrest for trespass of Negroes who visit the Glen Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator. Plaintiffs are Negroes,

some of whom were arrested by the defendant Collins, and some of whom claim that they have been prevented from visiting the Park by threats of arrest. Defendants are Francis J. Collins, individually and as Deputy Sheriff in and for Glen Echo Park, Montgomery County, Maryland, Luke J. Bennett, Jr., individually and as



Sheriff in and for Montgomery County, Maryland, Rekab, Inc., and Kebar, Inc., Maryland corporations, respectively the owner and the operator of the Park. The case is before this court on the motion of defendants other than Sheriff Bennett to dismiss the complaint or to stay further proceedings and plaintiffs' motion for a preliminary injunction. Plaintiffs have also filed a motion for summary judgment, a stipulation of certain facts has been filed, and both parties have filed affidavits in support of their several motions. Defendants argue that the case should not be disposed of on motion for summary judgment, contending that certain material facts are disputed and stating that they may wish to present some evidence on the merits if their motion to dismiss is denied. Both sides are agreed, however, that this court may consider the stipulation of facts and the affidavits in passing on the motion to dismiss the complaint and the motion for preliminary injunction.

#### FACTS

The following facts are stipulated:

"1. The plaintiffs are Negroes, are citizens of the United States and presently reside in Washington, D. C.

"2. At all times pertinent to this action, Rekab, Inc. was the owner of the premises known as Glen Echo Amusement Park (hereinafter referred to as 'Park') and Kebar, Inc. was the holder of a lease from Rekab, Inc. under the terms of which the said Kebar, Inc. operated the Park. These corporations are duly organized and exist under the laws of the State of Maryland. Operation of the Park is subject to the customary fire, health and related regulations. The Park is located along the Potomac River in Montgomery County, Maryland, approximately 2.5 miles from the Maryland-District of Columbia line. It is the largest amusement park in the metropolitan Washington area and is directly accessible by public transportation within the area.

"3. Defendant Francis J. Collins has, at all times pertinent to this action been employed by the National Detective Agency, charged under the terms of this employment with serving as supervisor of the guard force at the Park.

"4. The National Detective Agency is employed by Rekab, Inc. and by Kebar, Inc. to provide a force of guards at the Park.

"5. The duties of the guard force at the Park

include maintaining order within the Park and enforcing the policies of the owners and operators of the Park with regard thereto.

"6. At all times pertinent to this action the defendant Collins held a commission from the State of Maryland as a Special Deputy Sheriff for Montgomery County, Maryland.

"7. Defendant Kebar, Inc., as operator of the Park, advertises publicly in the Washington metropolitan area. These advertisements do not indicate who, if anyone, would be excluded from use of the Park.

"8. The Park is a recreational facility privately owned and operated for profit as a commercial enterprise. It has at all times been operated on a well-maintained basis catering primarily to those persons living in the nearby metropolitan Washington area, with the amusement facilities of the Park being directed largely toward the entertainment of children.

"9. The owners and operators of the Park feel that the maintenance of their Park in its present condition as a private business requires a business policy which does not permit Negroes to attend the Park. Accordingly, Negroes who seek admission to the Park are excluded solely on account of their race. This policy is presently in effect.

"10. Persons employed by the National Detective Agency and assigned to the Park, including Francis J. Collins, have been advised, by the owners and operators of the Park, of the business policy of the Park with respect to the admission of Negroes.

"11. On or about July 1, 1960, Francis J. Collins, attired in the uniform customarily worn by him as supervisor of the National Detective Agency guards, after consulting the Park Office and the agents, servants and employees of Rekab, Inc. and Kebar, Inc., did advise William L. Griffin, Gwendolyn Greene and Ronyl Stewart, who had entered the Park premises with knowledge of the business policy of the Park owners and operators with respect to the admission of Negroes to the Park, that pursuant to the policy of the Park they were not welcome. The behavior of said plaintiffs at all times was orderly and peaceful. Defendant Collins requested them to leave and further advised them that if they did not leave peaceably within a reasonable time, they would be subject to arrest for trespass. When they refused so to do, he, acting pursuant to his authority as a Special Deputy Sheriff for Montgomery County, Maryland, did

arrest the aforementioned persons, plaintiffs herein, for violation of Article 27, Section 577 of the Annotated Code of Maryland (1957 ed.) which alleged violations are currently pending before the Circuit Court for Montgomery County, Maryland. At the time of their arrest, plaintiffs Griffin and Greene had in their possession 'ride' tickets obtained for them by white companions. These tickets bore the following legend: 'Management reserves the right to revoke the privileges granted by this ticket by refunding its purchase price.'

"12. Admission to the Park is free. Tickets for use within the Park are obtainable at various booths located within the Park. It is the practice within the Park that these tickets may be transferred among those persons admitted to the Park. Pursuant to the policy of the owners and operators of the Park not to admit Negroes to the Park premises, it is the policy of the owners and operators of the Park not to sell tickets to Negroes for use within the Park and not to honor tickets for use in the Park held by Negroes, however obtained.

"13. It has been the business policy of Rekab, Inc. and Kebar, Inc., since they acquired the ownership of the Park in 1955, to have a Special Deputy Sheriff on the premises at all times to insure the orderly operation of the Park."

#### *[Allegations of Complaint]*

The complaint also alleges:

"9. Defendant Collins, acting for and pursuant to the directions of defendants Rekab and/or Kebar, has implemented and enforced the racially discriminatory policies of the defendant corporations at Glen Echo Park. Defendant Bennett, having knowledge that defendant Collins was using his state authority to implement and enforce the racially discriminatory policies of defendants Rekab and Kebar, continued to allow defendant Collins to possess and exercise that authority for such purposes."

"11. Defendants Rekab and Kebar, on numerous occasions during the preceding twelve months, have placed and caused to be placed in newspapers, on billboards and on radio and television, advertisements of Glen Echo Park directed to the residents and public-at-large of the metropolitan Washington area. Said advertisements in substance invited members of the public to use and enjoy the recreational facilities of Glen Echo Park. Said advertisements

did not state that the park maintains a policy of racial discrimination, nor did they indicate that members of the Negro race otherwise would be unwelcome."

"14. Defendants, individually or acting through their employees, agents and servants, have told plaintiffs and others similarly situated, and have publicly announced their intention of maintaining their policy of racial discrimination by causing the arrest, under color of law and by use of state authority, of all Negroes who attempt to enter Glen Echo Park or use its facilities.

"15. The statements and announcements above referred to are part of a continuing conspiracy by all defendants to maintain racial discrimination, enforced by use of governmental action and authority, at Glen Echo Park.

"16. The conspiracy above described and the arrests and acts made and taken pursuant thereto, are carried out under color of statutes, ordinances, regulations, customs or usages of the State of Maryland.

"17. The above described acts of defendants are unlawful in that they constitute state enforced racial discrimination in a place of public accommodation—more particularly, the sole public amusement park in the metropolitan area of the District of Columbia—in contravention of plaintiffs' rights secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and by the laws of the United States, including, among others, the provisions of 42 U.S.C. §§ 1982 and 1983."

#### *[Prayers for Relief]*

The complaint ends with prayers that this court:

"A. Adjudge and declare that the defendants' acts in utilizing governmental authority and powers of the state and the sanctions of state law to aid, support and enforce the denial to plaintiffs, solely because of their race, of admission to Glen Echo Park and enjoyment of its facilities, are in violation of plaintiffs' rights under the Constitution and laws of the United States;

"B. Issue an injunction, permanently and pendente lite, restraining and preventing defendants and each of them, and the officers, employees, agents and servants of the corporate defendants, from doing any and all acts, including, without limiting the generality of the foregoing, the

threatening, making or causing to be made any arrests under the criminal trespass or any other statutes of the State of Maryland which are designed or have the effect of preventing plaintiffs or any other individuals similarly situated from peaceably entering the public amusement park known as 'Glen Echo Park' in Montgomery County, Maryland, from peaceably using and enjoying or attempting to use and enjoy the facilities located in said public amusement park, from peaceably entering into or attempting to enter into contracts with persons in said amusement park for the use and enjoyment of the facilities located therein, and from peaceably purchasing or attempting to purchase articles of personal property on sale in said public amusement park, solely on the ground of their race or color; and

"C. Grant such other and further relief as to the Court may seem just and proper."

*[Statements in Affidavits]*

The affidavits attached to the motion for summary judgment state that certain of the plaintiffs are "genuinely apprehensive of an arrest and, for that reason, have not subjected [themselves] to the possibility of an arrest by attempting to use the park facilities", although they and their families desire to enjoy the facilities of the Park.

The criminal charges against plaintiffs Griffin, Greene and Stewart are set for trial before a jury in that Court on September 12, 1960. The park will close on September 11, 1960, and will not reopen until April, 1961.

#### DISCUSSION

Art. 27, sec. 577 of the Maryland Code, for the alleged violation of which plaintiffs Griffin, Greene and Stewart were arrested and are now being prosecuted, reads as follows:

"§ 577. Wanton trespass upon private land.

"Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than

one, nor more than one hundred dollars, and shall stand committed to the jail of county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the right to appeal from the judgment of said justice of the peace to the circuit court for the county or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

This statute was adopted in 1900. Its application to a situation similar to the one here involved has never been presented to the Maryland Court of Appeals. However, in 1959, several Negroes who visited Gwynn Oak Amusement Park in Baltimore County in opposition to the policy of the management were arrested by an officer summoned by the management and charged with violation of Art. 27, sec. 123, which deals, *inter alia*, with disorderly conduct in a place of "public resort or amusement". They were convicted by Judge Menchine, sitting without a jury, in the Circuit Court for Baltimore County; an appeal from that conviction is now pending in the Court of Appeals of Maryland. In his opinion Judge Menchine said:

"In *Madden v. Queens County Jockey Club*, 72 N.E.2d 697 (Court of Appeals of New York), it was said at Page 698:

"At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. \* \* \* On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. \* \* \*

"The common-law power of exclusion, noted above, continues until changed by legislative enactment."

"The ruling therein announced was precisely adopted in the case of *Greenfeld v.*

Maryland Jockey Club, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

"The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic."

[*Rule of Circuit and District*]

The rule cited by Judge Menchine has long been the rule in this circuit and this district. See *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4 Cir., 1959); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D.Md., 1960), and cases cited therein. "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Cf. *Dawson v. Mayor & City Council of Baltimore*, 220 F.2d 386 (4 Cir., 1955), *aff'd* 350 U.S. 877.

Plaintiffs concede the right of the corporate defendants, as owners and operators of Glen Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants like other property owners or operators of a private business may use "self-help" to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, that if the proprietor of a business calls a police officer, deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity, and (2) deprive the Negro of his rights under 42 U.S.C.A. 1981 and 1983.

Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to

eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.

In the instant case, however, it is alleged that defendants went further, and that as a result of previous concerted action by defendants—the Sheriff of Montgomery County, the owner and the operator of the Park, and Collins, a guard provided by the National Detective Agency—Collins was appointed a Special Deputy Sheriff for Montgomery County.<sup>1</sup> It is stipulated by all the parties that "the duties of the guard force at the Park include maintaining order within the Park and enforcing the policies of the owners and operators of the Park with regard thereto".

[*Motions Denied, Further Action Postponed*]

The allegations and stipulations in this case present a set of facts as to the legal effect of which I intimate no opinion at this time, except that the case should be heard on its merits on all the facts either side wishes to present, and not disposed of on a motion for preliminary injunction, a motion to dismiss, or a motion for summary judgment.

The questions here presented will be involved in the trial of the criminal charges, now set for hearing in the Circuit Court for Montgomery County within three weeks. Under all the circumstances, I conclude that I should postpone any further action in this case until after the disposition of the criminal charges, subject to the right of either party to request an earlier hearing if the disposition of those charges should be delayed. The court should try to avoid the situation which developed in *Wolfe, et al. v. North Carolina*, ..... U.S. .... (June 27, 1960). See also *Reid v. City of Norfolk, Va.*, 179 F. Supp. 768 (E.D.Va., 3-judge court, 1960); *Harrison v. N.A.A.C.P.*, 360 U.S. 167 (1959). Cf. *N.A.A.C.P. v. Bennett*, 360 U.S. 471 (1959).

Defendants' motion to dismiss and plaintiffs' motions for preliminary injunction and for summary judgment are hereby denied, without prejudice.

1. At the hearing counsel for plaintiffs stated that plaintiffs were not seeking to recover damages for a conspiracy, but counsel did not withdraw the allegation of concerted action between defendants contained in the complaint.



## PUBLIC ACCOMMODATIONS Dancing Schools—Massachusetts

David H. CRAWFORD v. Robert L. KENT, Inc., etc.

Supreme Judicial Court of Massachusetts, Suffolk, June 3, 1960, 167 N.E.2d 620.

**SUMMARY:** Plaintiff sought dancing lessons from defendant, but his application was refused. He filed suit for damages under the Massachusetts public accommodation law. The trial court found that defendant was operating a business for profit and that plaintiff had been refused lessons because of his color, and so awarded damages. However, the Appellate Division ruled that the dance school was an "educational institution" so as to fall within the exception allowed by the statute. On appeal, the Supreme Judicial Court held that the school was a commercial enterprise and not "educational" in the ordinary and statutory sense. The judgment of the trial court was reinstated.

Before WILKINS, C. J., and SPALDING, WILLIAMS, COUNIHAN and CUTTER, JJ.

WILKINS, Chief Justice.

In order to receive dancing lessons, the plaintiff presented himself at the studio where the corporate defendant conducted a dancing school. The individual defendant, who was the manager, as well as president and treasurer, refused the plaintiff lessons because of his color. These two actions of tort seek recovery, as provided in G.L. c. 272, § 98 (as amended through St. 1950, c. 479, § 3),<sup>1</sup> because of discrimination in a "place of public accommodation, resort or amusement," as defined in G.L. c. 272, § 92A (as amended through St. 1953, c. 437). The trial judge found in substance that the dancing school, known as Fred Astaire Dance Studios of Boston, was a business operated for profit. She ruled that it was not operated for "educational purposes," so as to fall within an exception cre-

ated by § 92A.<sup>2</sup> Findings for the plaintiff were vacated by the Appellate Division, which ordered the entry of findings for the defendants. The plaintiff appealed.

The opinion of a majority of the Appellate Division reached the conclusion that, as matter of law, the defendant corporation was an organization operated for educational purposes. We think that this was error, and that the findings of the trial judge must be reinstated. An "organization operated for \* \* \* educational purposes" within the meaning of the statute must be "educational" in the ordinary sense. In *Kurz v. Board of Appeals of No. Reading, Mass.*, 167 N.E.2d 627, we have held that "educational use" within the local zoning by-law did not include a commercial enterprise providing instruction in dancing. In the cases at bar there was evidence, which we need not recite, which warranted the trial judge's findings.

The orders of the Appellate Division must be reversed and judgments entered for the plaintiff in accordance with the findings of the Municipal Court.

So ordered.

1. "Whoever makes any distinction, discrimination or restriction on account of religion, color or race, except for good cause applicable alike to all persons of every religion, color and race, relative to the admission of any person to, or his treatment in, any place of public accommodation, resort or amusement, as defined in section ninety-two A of chapter two hundred and seventy-two \* \* \* shall forfeit to any person aggrieved thereby not less than one hundred nor more than five hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act \* \* \*."

2. "[N]o place shall be deemed to be a place of public accommodation, resort or amusement which is owned or operated \* \* \* by any organization operated for charitable or educational purposes."

## PUBLIC ACCOMMODATIONS Gymnasiums—California

**Leslie GARDNER v. VIC TANNY COMPTON, INC., a California Corporation.**

District Court of Appeal, Second District, Division 3, California, July 7, 1960, 6 Cal. Rptr. 490.

**SUMMARY:** Plaintiff, a Negro, had applied to a gymnasium for a physical education course but had been rejected on account of race or color. He then brought an action in a state court against the gymnasium's corporate owner to recover damages for an alleged violation of provisions of state civil rights statutes concerning equal rights of all citizens to use facilities and privileges of all places of public accommodation or amusement free of racial discrimination. Defendant denied that the gymnasium is a place of public accommodation. Although the operators of the gymnasium, by advertisements, invited the public to apply for courses, a director testified that applicants were interviewed before being accepted and that the manager could exercise his discretion to reject applicants "who would be detrimental to the business welfare at that specific location." He also denied that there was a general policy of rejecting all Negroes. The trial court gave judgment for defendant upon finding that, since defendant's premises were open to, and its courses were furnished to, some but not all members of the general public, the gymnasium was not a place of public amusement or public accommodation. On appeal, the district court affirmed, holding that the evidence substantially sustained the trial court's finding, inasmuch as the gymnasium was not open to the general public but was limited to those granted membership after an application and interview satisfactory to the manager.

VALLEE, Justice

Appeal by plaintiff from an adverse judgment in an action to recover damages for alleged violation of Civil Code, sections 51 and 52.<sup>1</sup>

1. At the time in question (1956) section 51 read: "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."

At the time in question (1956) section 52 read: "Whoever denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code, or who aids, or incites, such denial, or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose."

Defendant Vic Tanny Compton, Inc., is a California corporation. On November 3, 1956 plaintiff applied to defendant in writing to take a course in physical training at defendant's gymnasium in Compton and offered to pay the amount requested for a "course of physical education." Defendant declined to furnish the course to plaintiff. The sole reason defendant refused was on account of plaintiff's race and color, and not for reasons applicable "to all citizens alike of every race, creed or color."

The court found: the premises of defendant "were open to engagement by some but not all members of the general public"; defendant "furnished courses of education to others of the general public but not to all members thereof"; "the facts of the case do not bring it within" Civil Code, section 51 or 52; the premises operated by defendant "did not constitute a place of public amusement or public accommodation at the time or times plaintiff was denied admission."

### [The Sole Question]

The sole question is whether the finding that defendant's gymnasium was not a place of public accommodation or public amusement is sustained by the evidence. The only evidence introduced at the trial was as follows: The vice-

president of defendant's advertising agent in October 1956 testified to a list of television stations over which defendant advertised between June 7, 1956 and December 1, 1956. Examples of the advertisements were introduced in evidence. A specimen of the script used is set out in the margin.<sup>2</sup>

A director of defendant testified: he had been connected with "Vic Tanny Compton Gym" for several years and in November 1956. In November 1956 the facilities at "Compton Gym" were various types of equipment designed and utilized for corrective exercise, specifically "gym" equipment, showers, and dressing facilities. There was no swimming pool or steam room. At that time people were allowed to come in on a membership basis; they were enrolled for six months or a year. A person applying for membership had "to make out an application" in writing. The procedure when a person came into the "gym" was as follows:

"[T]he first thing the management must do is to find out whether the person is sincere in their desire to improve their physical appearance, physical condition and improve their health.

"Q. Was that the only measure which you used to allow or disallow people from membership? A. Definitely not.

"Q. What other policy did you follow at that place at that time? A. Well, a person

2. "Pick up your telephone and call your nearest Vic Tanny Gym . . . Find out about the great offer that Vic Tanny's making now . . . This is—inviting you inside a Vic Tanny Gym for Women . . .

"Vic Tanny has the largest and finest chain of gyms in America . . . There's specialized equipment for reducing or weight gaining, or bust development . . . Results are guaranteed . . . Now here's Vic Tanny . . . Overweight or Under Weight, . . . The Results We Give You Are Guaranteed and Permanent . . . Stop In At Our Gyms Anytime.

"You business men who are fighting the battle of the bulge . . . Start now at Vic Tanny's . . . Now, if you happen to be thin, like this fellow, soon you'll have a perfect physique, like this . . . At Vic Tanny's Beginner's Courses start every day . . . You'll enjoy every moment . . . You'll have a lot of fun . . .

"Remember, if you would like a guest card for a complete Free Trial . . . Just pick up your telephone and call your nearest Vic Tanny Gym and they'll give you one of these guest cards. . . Also, tell them your present weight. . . Ask how long it will take to have the results you want . . .

"Remember, if you join now and go for example, 3 times a week, it averages only 55¢ a visit on a regular course basis. Vic Tanny Gyms are everywhere. . .

"Gyms in Van Nuys, Long Beach, Westwood. . . they're everywhere. . ."

must be—let me see, how would I put that correctly?—the manager is instructed to use his own discretion as far as screening people; not to accept anyone who would be detrimental to the business welfare at that specific location.

"Q. Did that include also an instruction to them that Negroes were detrimental to the welfare of that particular establishment?

A. It was put on the basis where the manager, of course, was in charge of the gym and did the screening himself to use his own judgment on the merits of the individual and not to any single specific group or to Negroes as a block. \* \* \* A person who had any physical history of any medical difficulty whatsoever or psychological emotional problems, it is obvious we would never enroll.

"Q. How would you determine it? Is that on the application at the time? A. No, it is done in the process of the manager interviewing the individual. \* \* \*

"Q. \* \* \* You stated that the policy was of turning down people who wouldn't further the business; is that correct? A. I said that we would not accept anyone whom they might judge as being detrimental to the business.

"Q. Well, didn't that include a general policy of turning down all Negroes? A. I wouldn't say that. \* \* \*

"Q. \* \* \* The general public may apply for admission; is that correct? A. I would say so.

"Q. Your invitation advertising was given to everyone; is that correct? A. 'Eight to eighty' is the way we stated it.

"Q. Was a year the lowest period of time which you would allow anybody to enroll for? A. The only exception would be guests of existing members who were training at some gym out of town and were visiting for a short period of time. \* \* \*

"Q. \* \* \* Did you in November of 1956 have a general policy at the Compton Gym to refuse admission to Negroes? A. No."

Defendant also issued guest passes.

"Q. That is all you had to do, is just call up and say, 'Mr. Smith, I would like a guest card. I would like to come over and work out,' and you would let them work out? A. Well, we would set up an appointment for them when and where we

could have the extra help there and take them through the guest trial to see whether they would be adaptable to the program."

[Civil Rights Statutes' Scope]

The Civil Rights Statutes are concerned with the protection of equal rights with respect to facilities and services offered to the public by private persons. 10 Stanford L.Rev. 253, 255. "The intent of section 51 is to give all persons full and equal accommodations and privileges in places of public accommodation and amusement, 'subject only to the conditions and limitations established by law, and applicable alike to all citizens.'" *McClain v. City of South Pasadena*, 155 Cal.App.2d 423, 432, 318 P.2d 199, 206.

The scope of the statutes is limited to places of public accommodation and amusement. The courts have construed section 51 as applicable to public saloons and bars (*Evans v. Fong Poy*, 42 Cal. App. 2d 320, 108 P.2d 942); a theater (*Jones v. Kehrlein*, 49 Cal.App. 646, 194 P. 55; *Prowd v. Gore*, 57 Cal.App. 458, 207 P. 490); a soda fountain where food is served (*Hutson v. Owl Drug Co.*, 79 Cal.App. 390, 249 P. 524); a municipal bathhouse and swimming pool open to the public (*Stone v. Board of Directors of City of Pasadena*, 47 Cal.App. 2d 749, 118 P.2d 866); a race track (*Pacific Turf Club v. Cohn*, 104 Cal.App.2d 371, 231 P.2d 527; *Suttles v. Hollywood Turf Club*, 45 Cal.App.2d 283, 114 P.2d 27); a hotel (*Piluso v. Spencer*, 36 Cal.App. 416, 172 P. 412); a shoe store (*Lambert v. Mandel's of California*, 156 Cal.App.2d Supp. 855, 319 P.2d 469). On the other hand it has been held that section 51 is not applicable to a cemetery (*Long v. Mountain View Cemetery Ass'n*, 130 Cal.App.2d 328, 278 P.2d 945) or to a dentist's office (*Coleman v. Middlestaff*, 147 Cal.App.2d Supp. 833, 305 P.2d 1020).

["Public" Defined]

"Public" is sometimes defined as "Common to all or many; general; open to common use." *Black's Law Dict.*, 3d ed., 1460. One definition of "public" given by Webster is "Open to common, or general use, participation, enjoyment, etc.; as, a public place, tax, or meeting. Specif.: a Open to the free and unrestricted use of the public; as a public park or road. b Open to the enjoyment of the public under the rights and liabilities belonging to an action, occupation, use, or the like, called public (sense); serving the public under some degree of civic or state

control; as, a public house; public conveyances or utilities." It has been held that a public beach is one open to the common use of the public. *Brower v. Wakeman*, 88 Conn. 8, 89 A. 913, 914. And referring to a public lavatory, "one that is open to all who may choose to use it." *Irvine v. Commonwealth*, 124 Va. 817, 97 S.E. 769.

*Fowler v. Benner*, 13 Ohio N.P.N.S. 313, at page 316, says:

"It may not be unprofitable at this time to inquire what is meant by 'a place of public accommodation.' Anderson's law dictionary defines the word public, when used as an adjective, as in the phrase 'public accommodation,' to mean, concerning or affecting the people or community at large; or, a place for the accommodation of all persons. A public place may be defined, generally, to be a place to which any one may have access without trespassing (see *Century Dictionary*)."

[*Reed v. Hollywood Professional School*]

*Reed v. Hollywood Professional School*, supra, 169 Cal.App.2d Supp. 887, 338 P.2d 633, was an action for damages arising from refusal of a private school to enroll a Negro. The opinion states (169 Cal.App.2d Supp. at pages 888, 889, 891, 338 P.2d at page 634):

[The court here quoted most of the opinion in the *Reed* case, set out in 4 *Race Rel. L. Rep.* 305 (1959).]

We are in accord with the views thus expressed. On the evidence the court could and did find that defendant's facility was not within the operation of the statutes; that it was not a place of public accommodation or amusement. Membership in defendant's facility was not open to the public in general. It was limited to those granted membership after an application, an interview, and satisfaction of the manager. There is nothing in the statutes which has the effect of preventing defendant from maintaining a gymnasium for such persons as it saw proper to accommodate, and from excluding such persons as it saw proper to exclude. The record discloses substantial evidence to sustain the findings of the court. Such being the case, the action of the trial court may not be disturbed on review. *Gilmore v. Paris Inn*, 10 Cal.App.2d 353, 51 P.2d 1103.

Affirmed.

SHINN, P. J., and FORD, J. concur.



## PUBLIC ACCOMMODATIONS Hotels, Motels, Restaurants—Missouri

**Frank J. MARSHALL, doing business as Marshall's Restaurant et al. v. KANSAS CITY, MISSOURI.**

Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 5, July 1, 1960, No. 622, 387.

**SUMMARY:** After the Kansas City, Missouri, city council enacted an ordinance forbidding racial discrimination in the operation of any hotel, motel, or restaurant in the city and establishing a fair public accommodations committee to administer the ordinance [5 Race Rel. L. Rep. 248 (1960)], a restaurant proprietor and others brought an action against the city in a state circuit court, challenging the ordinance. The court granted plaintiffs' motion for judgment on the pleadings, holding the ordinance to be unconstitutional and enjoining defendant from enforcing it.

STUBBS, Judge.

### JUDGMENT

Now on this 1st day of July, 1960, Plaintiff's Motion for Judgment on the Pleadings and Defendant's Motion to Dismiss and Defendant's Alternative Motion for Judgment on the Pleadings are by the Court taken up and considered, and the Court, being duly and fully advised in the premises, finds that defendant's Motion to Dismiss and Defendant's Alternative Motion for Judgment on the Pleadings should be overruled, and the Court further finds that Motion of Plaintiffs for Judgment on the Pleadings should be sustained.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that Defendant's Motion to Dismiss and Defendant's Alternative Motion for Judgment on the Pleadings be and they are hereby overruled.

IT IS FURTHER ORDERED that Plaintiff's Motion for Judgment on the Pleadings be and the same is hereby sustained.

IT IS FURTHER BY THE COURT ORDERED, ADJUDGED AND DECREED that Ordinance No. 24250 enacted by the City Council of defendant Kansas City, Missouri, on or about the 15th day of January, 1960, is unconstitutional and void, and as such is not enforceable against the plaintiffs herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Kansas City, Missouri, its agents, servants and employees are hereby permanently enjoined from enforcing said ordinance against the plaintiffs herein.

IT IS FURTHER ORDERED that the costs of this action be assessed against defendant, for which let execution issue.

/s/ TOM J. STUBBS, Judge

## PUBLIC ACCOMMODATIONS Race Tracks—New Hampshire

**Carmine TAMELLEO and Danny Raimondi v. NEW HAMPSHIRE JOCKEY CLUB, INC. d/b/a Rockingham Park, and Vincent Murphy.**

Supreme Court of New Hampshire, Merrimack, July 19, 1960, 163 A.2d 10.

**SUMMARY:** Two men who had been refused admission to a race track in New Hampshire by an employee who deemed their presence "inconsistent with the orderly and proper conduct of a race meeting" brought an action in a state court against the corporate operator of the track and the employee to restrain them from denying plaintiffs the right to enter the park where the track is located. The case was reserved and transferred without ruling

to the state supreme court. The latter court held that, although there is no common law right in New Hampshire to operate a pari-mutuel race track, it is a private business, not a public calling, and that state licensing and other regulations do not alter its nature. It was also noted that the state adheres to the general rule that the proprietors of a private calling have the common law right to admit or exclude whomsoever they choose. The contention that the court should change the law because of altered social concepts was overruled on the ground that it is not the court's function to change public policy so drastically. And the court rejected a challenge to the constitutionality of a statute empowering a race track licensee to refuse admission to, and to eject from, the track enclosure anyone whose presence therein is "in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting." This provision was held to be substantially declaratory of the common law. But the court interpreted the term "sole judgment" of the licensee to mean that such judgment cannot be exercised in a capricious, arbitrary, or unreasonable manner; and, because there had been no finding on that question, it remanded the order.

BLANDIN, Justice.

Bill In Equity by the plaintiffs Carmine Tamelleo and Danny Raimondi against New Hampshire Jockey Club, Inc., D/B/A Rockingham Park, and Vincent Murphy, to restrain them from denying the plaintiffs the right to enter the park. The reserved case sets forth the following facts.

On August 3, 1959, the plaintiffs presented themselves at the defendant's race track but were refused admission to the race track premises by the action of the defendant Vincent Murphy, who ordered them to leave the premises because in his judgment their presence was inconsistent with the orderly and proper conduct of a race meeting.

The plaintiffs then left the premises and thereafter instituted these proceedings.

The defendant Murphy, for the purposes of this action, may be considered as an employee of the defendant New Hampshire Jockey Club, Inc., and his acts are the acts of the New Hampshire Jockey Club, Inc.

Further facts appear in the opinion.

Reserved and transferred without a ruling by Morris, J.

#### [*Plaintiffs' Contentions*]

The plaintiffs argue that there is no common-law right in this state to operate a pari-mutuel race track and, assuming there is, that this state does not recognize the common-law rule that the proprietor of a private enterprise, not a public calling, can discriminate without cause among his patrons.

It is firmly established that at common law proprietors of private enterprises such as the-

aters, race tracks and the like, may admit or exclude anyone they choose. *Woolcott v. Shubert*, 217 N.Y. 212, 222, 111 N.E. 829, L.R.A.1916E, 248; *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, certiorari denied 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346; 1 A.L.R.2d 1165 annotation; 86 C.J.S. Theaters and Shows § 31. While it is true, as the plaintiffs argue and the defendants concede, that there is no common-law right in this state to operate a race track where pari-mutuel pools are sold, horse racing for a stake or price is not gaming or illegal. Opinion of the Justices, 73 N.H. 625, 631, 63 A. 505.

However, the fact that there is no common-law right to operate a pari-mutuel race track is not decisive of the issue before us. The business is still a private enterprise since it is affected by no such public interest so as to make it a public calling as is a railroad for example. *Garfine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1; *Madden v. Queens County Jockey Club*, supra. Regulation by the state does not alter the nature of the defendant's enterprise, nor does granting of a license to conduct pari-mutuel pools. *North Hampton Racing and Breeding Association v. New Hampshire Racing Commission*, 94 N.H. 156, 159, 48 A.2d 472; *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A.2d 335. As the North Hampton case points out, regulation is necessary because of the social problem involved. *Id.*, 94 N.H. 159, 48 A.2d 475.

#### [*Adherence to Common Law Rule*]

We have no doubt that this state adheres to the general rule that the proprietors of a private calling possess the common-law right to admit or exclude whomsoever they choose. In *State v.*

United States & C. Express, 60 N.H. 219, after holding that a public carrier cannot discriminate, Doe, C. J., stated, "Others, in other occupations, may sell their services to some, and *refuse to sell to others.*" Id., 60 N.H. 261. (Emphasis supplied.)

In *Batchelder v. Hibbard*, 58 N.H. 269, the Court states that a license, so far as future enjoyment is concerned, may be revoked any time. A ticket to a race track is a license and it may be revoked for any reason in the absence of a statute to the contrary. *Marrone v. Washington Jockey Club*, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679.

Cases cited by the plaintiffs in support of a contrary proposition are clearly distinguishable. For example, in *Sterling v. Warden*, 51 N.H. 217, the right invoked was to enter a United States post office. It was of course upheld. *Dicta* to the effect that one who keeps a store is "presumed to license all persons to enter who come there for lawful purposes" (Id., 51 N.H. 231) merely supports the proposition that one who enters such a place is not a trespasser unless his license is revoked. See *Batchelder v. Hibbard*, supra. In short, we find no reason to believe New Hampshire has departed from the rule laid down by the overwhelming weight of authority in regard to the right of owners of private enterprises to discriminate as they choose between those seeking admission to their places of business.

#### [Public Policy Change Refused]

The plaintiffs also contend that if this be our law, we should change it in view of altered social concepts. This argument ignores altogether certain rights of owners and taxpayers, which still exist in this state, as to their own property. Furthermore, to adopt the plaintiffs' position would require us to make a drastic change in our public policy which, as we have often stated, is not a proper function of this court.

The plaintiffs take the position that RSA 284:39, 40 as inserted by Laws 1959, c. 210, § 4, is invalid as an unconstitutional delegation of legislative power. We cannot agree. Laws 1959, c. 210 is entitled: "An Act Relative to Trespassing on Land of Another and At Race Tracks and Defining Cultivated Lands." Section 4 (RSA

284:39, under the heading "Trespassing," reads as follows: "Rights of Licensee. Any licensee hereunder shall have the right to refuse admission to and to eject from the enclosure of any race track where is held a race or race meet licensed hereunder any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting." As applied to this case this provision is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire. *Garfine v. Monmouth Park Jockey Club*, 29 N.J. 47, 148 A.2d 1.

#### [Statute Sustained]

The penalty provision, section 4 (RSA 284:40) states: "Penalty. Any person or persons within said enclosure without right or to whom admission has been refused or who has previously been ejected shall be fined not more than one hundred dollars or imprisoned not more than one year or both." This provision stands no differently than does that imposing a penalty upon one who enters without right the cultivated or posted land of another. RSA 572:15 (supp.) as amended. One charged with either of these offenses or with trespass at a race track would of course have a right to trial and the charge against him would have to be proved, as in any other criminal matter. No license to pass any laws is given to the defendant. The situation is clearly unlike that condemned in *Ferretti v. Jackson*, 88 N.H. 296, 188 A. 474, and *Opinion of the Justices*, 88 N.H. 497, 190 A. 713, upon which the plaintiffs rely, where the milk board was given unrestricted and unguided discretion, in effect, to make all manner of laws within the field of its activity. It thus appears that there is no unlawful delegation of legislative powers in the present case.

We interpret that part of the statute which allows the defendant licensee to exercise its "sole judgment" to mean that the judgment cannot be exercised in a capricious, arbitrary or unreasonable manner. There being no finding upon this question of fact before us, the order is Remanded.

WHEELER, J., did not sit; the others concurred.

## PUBLIC ACCOMMODATIONS Resorts—New York

**In the Matter of the application of Sylvia TROWBRIDGE d/b/a Trowbridge Farm v. Bernard KATZEN, Mary Louise Nice and John A. Davis, constituting the State Commission Against Discrimination.**

New York Supreme Court, Ulster County, Special Term, July 27, 1960, 203 N.Y.S.2d 736.

**SUMMARY:** A New Yorker, who is Jewish, responded to petitioner's advertisement for her resort farm. In reply, he received a letter, a rate card, a leaflet, and a brochure. The phrase "Serving Christian Clientele Since 1911" appeared twice in the brochure. A complaint was filed with the New York State Commission Against Discrimination, alleging violation of the New York Civil Rights law since the brochure phrase meant that Jewish guests were not acceptable, desired or solicited at the petitioner's farm. At a hearing, the commission rejected the petitioner's defenses and ruled that the farm was a place of public accommodation and that the challenged phrase expressed an intent to limit patronage to guests of a particular religious belief. An order was entered requiring the elimination of the phrase in advertising and prohibiting discrimination generally. 5 Race Rel. L. Rep. 552 (1960). Petitioner then applied to a New York Supreme Court to review the order, and the commission filed a cross-motion to enforce. On trial, the court set aside the order, holding that the phrase in question would not reasonably be interpreted so as to violate the statute's proscription of words indicating "that the patronage or custom thereof of any person belonging to or purporting to be of any particular race, creed, color or national origin is unwelcome, objectionable, or not acceptable, desired or solicited."

### MAC AFFER, J.

The petitioner herein makes an application pursuant to Section 298 of the Executive Law to review an order of the State Commission against Discrimination, hereinafter referred to as the Commission, which order was dated April 29, 1960.

The Commission has served a cross motion for an order pursuant to Section 298 of the Executive Law enforcing the said order of the Commission and requiring the petitioner to comply with the provisions of such order.

The order of the Commission was made following a hearing which was held pursuant to a notice of hearing served by the Commission upon the petitioner in accordance with the provisions of Section 297 of the Executive Law. There was served with the notice of hearing to be held January 12, 1960 a copy of the complaint verified by Robert S. Sachs on the 5th day of June, 1959.

The complaint sets forth that the petitioner herein advertised in the New York Herald Tribune on or about May 17, 1959 the merits of "Trowbridge Farm" in such a manner and for the purpose of attracting guests that the complainant thereafter wrote to Trowbridge Farm

and requested information concerning the resort; that thereafter by letter dated May 29, 1959 he received a reply signed (Mrs.) Sylvia Trowbridge & son, inviting him to make a reservation and enclosing a booklet; that the booklet in two places had printed thereon the words "Serving Christian Clientele since 1911"; that he is of the Jewish creed and that such words are discriminatory in that they clearly indicate that persons of the Jewish creed are not acceptable, desired or solicited at Trowbridge Farm.

### [Special Appearance]

The petitioner interposed a special appearance challenging the jurisdiction of the Commission together with an answer denying the charges contained in the complaint which it was requested should not be considered as a general appearance unless and until the motion to dismiss should be denied. The record of the hearing discloses that the motion to dismiss was denied.

The proof adduced at the hearing on February 2, 1960 did not develop any issues of fact as to the insertion of the advertisement, the mailing of the brochure or the printing thereon. The Commission did offer Exhibit 7 in evidence which contained letters setting forth that the petitioner has had guests of the Jewish creed. The grava-



men of the complaint is the use of the words "Serving Christian Clientele since 1911." The complainant was permitted to testify that in his opinion "it (referring to the aforesaid words) indicated that the Trowbridge Farms were definitely not soliciting Jewish clientele. That was my objection."

The Commission determined that the use of said words in said manner by the petitioner constituted a violation of section 296, subdivision 2, of the Executive Law. Mr. Bernard Katzen, Presiding Hearing Commissioner, handed down an opinion in which he concluded the said words were to the effect that the patronage or custom of non-Christians at Trowbridge Farm was unwelcome, objectionable or not acceptable, desired or solicited. Hearing Commissioner Nice concurred in Mr. Katzen's opinion. Hearing Commissioner Davis dissented in an opinion in which he contended that said words were to the effect only that Jewish patronage "was not desired or solicited." Thus, there appears to be disagreement even within the Commission as to the effect of said words. Nevertheless on such opinions the Commission made its findings of fact and conclusions of law under date of April 29, 1960 that the language "Serving Christian Clientele since 1911", as used by the petitioner, means that the patronage or custom of non-Christians at Trowbridge Farm is unwelcome, objectionable or not acceptable, desired or solicited, in violation of section 296, subdivision 2, of the Executive Law. Thereupon the Commission made its cease and desist order under date of April 29, 1960 pursuant to section 297 of the Executive Law.

#### [Question of Law]

After reviewing the record this court reaches the conclusion that the sole question for determination is one of law, namely, whether the words used are susceptible of the conclusion reached by the Commission. Counsel for the Commission in the brief submitted on this motion concedes that the only substantial dispute as to the merits is a question of law, not of fact. Counsel for the Commission also concedes that the Commission has never heretofore passed upon or interpreted the meaning of the words which are the subject of the complaint. As above noted, the Commission itself was divided in its interpretation of the effect of the language.

This court is cognizant of the limitations imposed upon it by the provisions of Section 298

of the Executive Law with respect to the findings of fact by the Commission. The aforesaid statute provides that such findings of fact by the Commission shall be conclusive if supported by sufficient evidence on the record considered as a whole.

Section 296, subdivision 2 of the Executive Law, provides in part as follows:

"2. It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color or national origin of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin, or that the patronage or custom thereof of any person belonging to or purporting to be of any particular race, creed, color or national origin is unwelcome, objectionable or not acceptable, desired or solicited. (Emphasis supplied.)

The question posed on this review is: Did the use of these words constitute an unlawful discriminatory practice as provided in the aforesaid Section 296, subdivision 2, of the Executive Law, as found by the Commission.

It would seem to this court to so hold would be to give these words a strained meaning and purpose. The words may be said to describe the type of persons who, in the main, have patronized the resort but the use thereof does not in the court's judgment suggest that other than Christians are unwanted or excluded. Certainly, the letter written by the petitioner to the complainant in answer to his inquiry contained no such suggestion. It is not unusual to read advertisements which state "Italian cuisine," "French cooking" or "Kosher diet observed." Would one say that such descriptive words would establish that the author was engaging in a discriminatory practice pursuant to the provisions of the aforesaid statute.

How one individual person may interpret certain words may not be used as the standard in determining whether the use of such words are discriminatory within the meaning of the statute. In order to so construe the use of the words it would be necessary to reach the conclusion that the use thereof would indicate that the purpose therefor was to exclude persons because of their race, creed or national origin. This court appreciates the intent and purpose of this legislation and that the provisions of the act should be liberally construed to prevent such discrimination. Nevertheless no one should be penalized or punished unless the words employed are used to violate the provisions of the statute. It is unfair to determine that such a practice has been employed by indulging in a strained and sensitive interpretation of the meaning and purpose of the wording used.

[Other Phrases]

Commissioner Katzen in his opinion discusses other phrases upon which rulings have been made and states that no interpretation has heretofore ever been made of the phrase "Serving Christian Clients since 1911." In his opinion the Commissioner does discuss rulings with respect to use of the words "Selected Clientele" and the phrase "The Hillside Inn enjoys the con-

tinued year after year patronage of a select Christian clientele." The use of the word "selected" suggests that the guests are "selected" in some manner which is not stated and from only Christian people. These cited examples do not in the opinion of this court warrant the conclusion that the use of the words in question are violative of the statute.

The Commissioner also comments on the statement made in behalf of the petitioner that the resort has accepted some guests of a creed other than Christian but that no such statement was made in the brochure. Just how this fact could be stated without suggesting the thought of discrimination is difficult to understand.

In this court's opinion the fair construction of the phrase contained in the brochure does not warrant as a matter of law the conclusion that the petitioner committed an unlawful discriminatory practice in violation of Section 296, subdivision 2, of the Executive Law, as found by the Commission in its decision in this case.

The order of the Commission is therefore reversed on the law and wholly set aside without costs.

The Court having granted this relief to the petitioner, the cross motion of the Commission is denied with costs.

The attorney for the petitioner to submit order.

## RELIGIOUS FREEDOM Sunday Laws—New Jersey

### STATE of New Jersey v. Dave FASS.

Hudson County Court, Law Division (Criminal), New Jersey, June 30, 1960, 162 A.2d 608.

**SUMMARY:** For selling carpeting on Sunday, an individual of the Orthodox Jewish faith was convicted in a municipal court of violating a New Jersey statute which makes it an offense to expose any goods openly to sale on Sunday. On appeal, the criminal law division of the county court rejected defendant's contention that the statute allows immunity to seventh day observers and, therefore, to him. However, it reserved decision on his contention that the statute violates certain provisions of the state constitution and of the Fourteenth and First Amendments to the United States Constitution, because the question of constitutionality was at the time pending before the state supreme court in another case. The latter court having now ruled that the statute is not invalid as a law respecting the establishment of religion, the county court in the instant case held further that it does not prohibit the free exercise of religion and found the defendant guilty. The court rejected the

argument that the statute, in that it inhibits his free exercise of religion, places defendant at a competitive disadvantage with business rivals by causing his store to be closed on Sunday in addition to its being closed on Saturday by reason of his conscience, resulting in severe economic loss to him. It was pointed out that "free" as used in the federal and state constitutional freedom of religion provisions does not mean "at no cost" but signifies rather an absence of government restriction or interference, the court remarking that when one embraces the obligations of a religious sect he necessarily assumes the financial burdens which that choice entails.

DUFFY, J. C. C.

This is an appeal from a conviction in the West New York Municipal Court of the offense of selling carpeting on Sunday in violation of Chapter 119 of the Laws of 1959 (N.J.S. 2A:171-5.8 et seq., N.J.S.A.)

The defendant is of the Orthodox Jewish faith and observes Saturday as the Sabbath, keeping his store closed, abstaining from all recreation and devoting the day to the exercise of religious worship. As a consequence, he contends: (a) that he is entitled to the immunity allowed by N.J.S. 2A:171-4, N.J.S.A. in the case of seventh day observers; (b) that Chapter 119 of the Laws of 1959 is violative of the Fourteenth and First Amendments of the United States Constitution and Sections Four and Five of Article One of the New Jersey State Constitution

[Immunity Claim Rejected]

The appeal was heard *de novo* on February 15 and 16, 1960. At the conclusion of that trial, I ruled adversely as to the defendant's claim of immunity as an observer of the Saturday Sabbath. From the evidence it was clear that the defendant did not come within the protection of N.J.S. 2A:171-4, N.J.S.A., which contains the following proviso:

"This section shall not be construed to allow any such person to openly expose to sale on Sunday any goods, wares, merchandise, or any other article or thing in the line of his business or occupation."

I determined as a matter of fact that the defendant had openly exposed the prohibited merchandise to sale on Sunday.

I reserved decision on the constitutional grounds urged by the defendant. The question of the general constitutionality of the statute was at the time pending in the New Jersey Supreme Court in the case of *Two Guys from Harrison, Inc. v. Furman*. The question of its religious validity was before the Federal District Court.

The opinion of the Supreme Court in *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199, 160 A.2d 265 (1960) is dispositive of the defendant's contention as to the general unconstitutionality of the statute. Furthermore, by its characterization of the statute as non-religious and non-sectarian, the Supreme Court has considerably weakened the thrust of defendant's contention that the statute prohibits the free exercise of religion. Construed as a legitimate legislative exercise of the police power, the incidental or indirect hardship that the operation of the statute may occasion, even in the area of religion, must be weighed against the requirements of the general health, safety, morals and welfare of the community.

The defendant maintains that he is put under a competitive disadvantage with respect to his business rivals because his store is closed by reason of conscience on Saturday and legal sanctions on Sunday. He contends that his economic loss is so severe that he will be required either to yield his means of livelihood or compromise his religious convictions.

["Free" Exercise of Religion]

It seems to me, however, that when a person embraces the obligations of a religious sect, he is faced with the necessity of assuming the financial burdens which that choice entails. The "free" exercise of religion does not logically carry with it the proposition that the members of a sect shall not be called upon to make some financial sacrifice in its behalf. "Free" as used in the Federal and State Constitutions is not synonymous with "at no cost." It signifies here rather an absence of government restriction or interference.

The case of *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292 (1943) has been advanced by the defendant as an example of the invalidity of financial sanctions imposed upon the practice of religion. That case concerned a license tax imposed by a municipi-

pality on the distribution of religious literature. The Legislature, however, by its enactment of Chapter 119 of the Laws of 1959, did not interfere with or restrict the defendant's freedom to observe Saturday as a religious holiday. Any financial inconveniences arising from the voluntary cessation of business activities on a particular day are attributable to the citizen's exercising his right to do so. In all probability, the observance of other religious holidays of the Orthodox Jewish faith may be the occasion of further economic or financial hardship. But this is not the concern of the State. In fact, any attempt to redress the situation in favor of the religious practitioner would undoubtedly fall squarely into that category of legislation interdicted by the First Amendment.

*[Religious Freedom not Violated]*

The United States Supreme Court in *Friedman v. New York*, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345, declined to entertain a claim that the New York Sabbath Law was violative of religious freedom by virtue of its effect upon persons observing a day other than Sunday as their holy day of rest. Our Supreme Court in the *Two Guys from Harrison* case, *supra*, decided that Chapter 119 is not a law respecting an establishment of religion. After considering the evidence here presented, I am of the opinion that the statute in question is equally free of any constitutional infirmity in relation to freedom of religion.

I find the defendant guilty.

## TRANSPORTATION

### Passenger Seating—Alabama

**Lillie BOMAN et al. v. BIRMINGHAM TRANSIT COMPANY et al., etc.**

United States Court of Appeals, Fifth Circuit, July 12, 1960, 280 F.2d 531.

**SUMMARY:** Thirteen Negroes brought a class action for declaratory and injunctive relief in federal district court against Birmingham, Alabama, city commissioners and a city-franchised, privately-owned transit company, alleging that defendants had applied an ordinance so as to deprive them of rights secured by the United States Constitution and the civil rights statutes. The ordinance authorized local public carriers to regulate passenger seating and provided that "a wilful refusal to obey a reasonable request of an operator . . . in relation to the seating of passengers . . . shall constitute a breach of the peace." Plaintiffs alleged particularly that the commissioners had agreed among themselves under color of law to compel obedience to the ordinance with respect to segregated seating of Negro passengers and that the company had conspired with the commissioners. It was established that on October 14, 1958, the commissioners enacted the ordinance, repealing other ordinances specifically requiring segregation in public transportation; that on October 15, the company posted notices so advising employees, but stating that signs had been placed in the buses reading: "White passengers seat from front, colored passengers seat from rear," and instructing operators that if passengers should refuse to comply therewith to notify the dispatcher's office; that on October 20 plaintiffs refused to comply with the seating rule, whereupon a police officer, not called by any company employee, arrested nine of the plaintiffs; and that plaintiffs were jailed and later convicted of breach of the peace before the city recorder. The federal court dismissed the action as to the transit company, reasoning that although the company's rule was an expression of a continued policy of segregation in seating, plaintiffs' civil rights were not violated because the company acted as a private person, and not under color of law. A request for an injunction was denied. 4 Race Rel. L. Rep. 1027 (1959). On appeal, the Court of Appeals for the Fifth



Circuit reversed, holding that the city had delegated to its franchise holder the power to make rules for the seating of passengers and made the violating of such rules criminal. Therefore, the court ruled, the bus company became an agent of the state to that extent. Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge.

This is an appeal from a judgment dismissing a class action on behalf of Negro patrons of the Birmingham Transit Company seeking to enjoin it from enforcing its published rule of seating passengers according to race.

The suit joined the City Commissioners of Birmingham as individuals and the Bus Company. It was alleged that the Company and the Commissioners were illegally enforcing a state law or policy of insisting on racial segregation of the seating in the buses, and that although the City of Birmingham was not joined, the officials, one of whom was the Police Chief, and the Bus Company were agents of the state in requiring segregated seating.

*[Birmingham Ordinance]*

This suit was brought soon after the City of Birmingham repealed the provisions of its code that had long required separate seating on City buses of Negro and white patrons. On the day the old ordinances were repealed a new one, No. 1487-F, was enacted by the City Commission. It provided as follows:

"Section 1. That carriers of passengers for hire operating in the City of Birmingham are authorized to formulate and promulgate such rules and regulations for the seating of passengers on public conveyances in their charge as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.

"Section 2. A willful refusal to obey a reasonable request of an operator or driver of such a public conveyance in relation to the seating of passengers thereon shall constitute a breach of the peace."

At approximately the same time as the enactment of this ordinance the Bus Company put new buses into service. Instead of having movable "color boards," separating the white and Negro portions of the bus, the Company painted signs at the front and rear of each bus:

"White Passengers Seat From Front,  
Colored Passengers from Rear."

Within a few days of this, a group of some twenty-five Negroes, including the plaintiffs in this action, boarded a bus and proceeded to sit in the front of the bus. The driver closed the doors of the bus and permitted no one else on the bus; he requested the passengers to move to the rear. They declined to do so. Thereupon, the driver called his supervisor, holding the bus out of operation in the meantime. The supervisor arrived and he asked the passengers to move to the rear. They again declined to do so. Then a police traffic officer arrived and a crowd began to gather. The police officer called his superior who went to the scene and ordered the operator to take the bus to the barn. Then two other police officers arrived and after another request by the operator that the passengers move, again fruitless, they arrested nine of them. They were held in jail until 2:00 A.M., released on bond, charged with disorderly conduct, conspiracy to commit a breach of the peace and a breach of the peace. After trial and conviction they were held in jail some five days awaiting sentence; thereafter they were released on appeal bonds.

*[Held Arrest Illegal]*

The trial court held that the arrest of the appellants was illegal and was a deprivation by the individual officers of their civil rights.<sup>1</sup> It

1. In this regard the Court said:

"A charge of 'a breach of the peace' is one of broad import and may cover many kinds of misconduct. However, the Court is of the opinion that the mere refusal to obey a request to move from the front to the rear of a bus, unaccompanied by other acts constituting a breach of the peace, is not a breach of the peace. In as far as the defendants, other than the Transit Company, are concerned, plaintiffs were in the exercise of rights secured to them by law.

Under the undisputed evidence, plaintiffs acted in a peaceful manner at all times and were in peaceful possession of the seats which they had taken on boarding the bus. Such being the case, the police officers were without legal right to direct where they should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company. It is evident that the arrests at the barn were based on the refusal of the plaintiffs to comply with the request to move since those who did move, though equally involved except as to compliance, were not arrested.

Under the facts in this case, the officers violated

found, however, that the individual officers acted on their own responsibility as police officers and not at the request of the Bus Company or under orders from the three City Commissioners or Chief of Police. The court found that the segregated seating rule was established by the Company on its own responsibility and that its driver sought only to use the quiet persuasion enjoined upon him by the instructions issued by the Company.<sup>2</sup> It is not disputed that the bus operators were instructed not to call the police in case of refusal to move. They were in-

the civil rights of the plaintiffs in arresting and imprisoning them. Ordinance 1487-F, and their 'wilful' refusal to move when directed to do so, did not authorize or justify their conduct."

2. These were in the form of two bulletins as follows:

"Bulletin Order.

Birmingham Transit Company.

Date Effective: Thursday, October 16, 1958.

Bulletin Order No. 176.

Subject: Ordinance Covering the Separation of Races.

All Concerned:

As you have seen in the newspapers, the City Commission has unanimously repealed all bus segregation ordinances to become effective Thursday, October 16, 1958. Signs have been placed in front and rear of all of our buses which read as follows:

White Passengers seat from front.

Colored Passengers from rear.

Every effort should be used to avoid conflicting problems. May we suggest that you use calmness and your very best judgment in handling any situation that might arise.

J. E. Crutchfield, Superintendent of Transportation."

"Bulletin Order.

Birmingham Transit Company

Date Effective: October 16, 1958.

Bulletin Order No. 177.

Subject: Handling of Passengers.

Date Posted: October 15, 1958.

All Operators:

In view of the repealing of ordinances having to do with the separation of passengers on buses, the following instructions are set forth in order that each operator will be relieved of the responsibility for problems that might possibly be encountered.

If instances should arise wherein passengers do not comply with the reasonable rules that are now in effect with reference to seating in buses the operator will approach the passengers involved and talk with them in a tactful manner and in a low voice, and request the cooperation of such passenger in complying with Company rules to further the safe and peaceful handling of passengers.

If the parties refuse, then you will notify the Dispatcher's office by nearest telephone as you have been doing.

You are aware of the existing conditions, and we request that you use calmness and your best judgment in handling any situation that might arise.

J. E. Crutchfield

Superintendent of Transportation."

structed to call their supervisor and in the meantime to hold the bus.

The appellants, having failed in their proof to show joint or agreed action between the appellee and the City Commissioners, lost the opportunity to argue that the Bus Company's action was, *for that reason*, state action. The trial court decided that this caused the case against the Bus Company to collapse and dismissed the suit as to it.

Appellants here assert the proposition that the City ordinance expressly granting authority to the franchised transit company to adopt seating rules at the identical meeting at which it repealed the compulsory segregation ordinance, so delegated the City's governmental authority, especially when the ordinance contained criminal sanctions for violation of the Company's rule, as to make the Company's adoption of the segregation rule state action.

Because of the peculiar function performed by this Transit Company as a public utility, and its relation to the City and State of Alabama through its holding of a special franchise to operate on the public streets of Birmingham, we conclude that so long as such an ordinance was in force, the acts of the Bus Company in requiring racially segregated seating were state acts and were thus violative of the appellants' constitutional rights. *Browder v. Gayle*, M.D. Ala., 142 F. Supp. 707, aff'd 352 U.S. 903; *Fleming v. South Carolina Elec. & Gas Co.*, 4 Cir., 224 F. 2d 752.

It was alleged in the complaint that the Bus Company "is engaged in operating within the corporate limits and police jurisdiction of said City [Birmingham], a bus line for transportation of passengers for hire, pursuant to a franchise issued by said City of Birmingham." This allegation was, as it must have been, admitted in the answer.

#### [Governmental Function]

The issuing of such a franchise by the City of Birmingham is a governmental function, controlled and authorized by the constitution of Alabama. Section 220 of the Constitution of 1901 reads:

"No person, firm, association or corporation shall be authorized or permitted to use the streets, avenues, alleys or public places of any city, town, or village for the construction or operation of any public utility

or private enterprise, without first obtaining the consent of the proper authorities of such city, town or village."

Such "consent" has uniformly been held by the Alabama Supreme Court to be a franchise. *Birmingham Interurban Taxicab Service Corp. v. McLendon*, 210 Ala. 525, 98 So. 578, 579. In the more recent case of *City of Mobile v. Farrell*, . . . Ala. . . ., 158 So. 539, the court said:

"The right to use the public streets for hire does not exist in public or private enterprises. The privilege is a grant by sovereign authority, and is what is generally termed a franchise [citing cases.]"

Further, in the same opinion, the court said:

"In construing the effect of a grant it must not be forgotten that it is in the nature of a privilege thus extended as well as the regulation of a business in which the grantee has no right to engage." (Emphasis added.)

It is, of course, fundamental that the justification for the grant by a state to a private corporation of a right or franchise to perform such a public utility service as furnishing transportation, gas, electricity, or the like, on the public streets of the city, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience. This is what differentiates the public utility which holds what may be called a "special franchise,"<sup>3</sup> from an ordinary business corporation which in common with all others is granted the privilege of operating in corporate form but does not have that special

3. In Black's Law Dictionary the following comment is pertinent:  
"FRANCHISE

General and Special. The charter of a corporation is its 'general' franchise, while a 'special' franchise consists of any rights granted by the public to use property for a public use but with private profit. *Lord v. Equitable Life Assur. Soc.* 194 N.Y. 212, 87 N.E. 443, 22 L.R.A., N.S. 420.

Secondary Franchise. The franchise of corporate existence being sometimes called the 'primary' franchise of a corporation, its 'secondary' franchises are the special and peculiar rights, privileges, or grants which it may receive under its charter or from a municipal corporation, such as the right to use the public streets, exact tolls, collect fares,

franchise of using state property for private gain to perform a public function.

Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, no matter how peaceable, quiet or rightful (as the court here held), such violation was, we conclude that the Bus Company to that extent became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the plaintiff's constitutional rights.

We think that there is nothing in *Eaton v. Board of Managers of James Walker Memorial Hospital*, 164 F. Supp. 191, aff'd 4 Cir., 261 F. 2d 521, cert. den. 359 U.S. 984, or *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d 845, that is inconsistent with what we have said here. Moreover, we fully recognize what has been known by all to be the law since the Supreme Court decided the Slaughter House Cases, 16 Wall (83 U.S.) 36, that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States . . ." *Shelley v. Kraemer*, 334 U.S. 1. We are forced to the conclusion here that the conduct of the Bus Company "may fairly be said to be that of the" State of Alabama through its franchising of the Bus Company and its authorizing it to adopt the rule in question enforceable by criminal sanctions.

The judgment must be REVERSED and the cause REMANDED for further proceedings not inconsistent with this opinion.

\* \* \*

CAMERON, Circuit Judge: I Dissent.

etc. *State v. Topeka Water Co.*, 61 Kan. 547, 60 P. 337; *Virginia Canon Toll Road Co. v. People*, 22 Colo. 429, 45 P. 398, 37 L.R.A. 711. The franchises of a corporation are divisible into (1) corporate or general franchises; and (2) 'special or secondary franchises.' The former is the franchise to exist as a corporation while the latter are certain rights and privileges conferred upon existing corporations. *Gulf Refining Co. v. Cleveland Trust Co.*, 166 Miss. 759, 108 So. 158, 160."

## TRIAL PROCEDURE Evidence—California

**PEOPLE of the State of California v. Paul Wesley SWEENEY.**

District Court of Appeal, Second District, Division 3, California, June 1, 1960, 5 Cal Rptr. 379.

**SUMMARY:** Defendant, a Negro, was convicted of giving away narcotics and giving a bribe to a deputy sheriff. He appealed on the ground, among others, that a question asked by the prosecution at the trial as to why he had not consulted leaders of the Negro community about a bribe offer injected a prejudicial racial issue into the proceedings. The court rejected the appeal, noting that "[W]e cannot say, as a matter of law, that an inference could not be indulged that defendant's failure to contact a prominent member of the Negro race indicated a consciousness of guilt." A portion of the opinion disposing of the racial prejudice contention is reproduced below.

VALLEE, Justice.

\* \* \*

On direct examination defendant testified he is an attorney at law and has been since March 1955; Nichols requested the \$500; he talked only to his wife about the matter. On cross-examination he testified that from the time Nichols requested the \$500 until the following morning when he paid the money, he was upset and nervous; one of the reasons he promised to pay was that he did not wish to "secure adverse publicity, or notoriety." He was then asked whether he knew Judge Jefferson. He said he did. He was then asked, "He is one of the leaders of the community of the Negroes?" Without objection he answered, "I don't know him personally." Defendant is a Negro. He said he did not know Judge Griffith personally. He was asked whether he knew Bernard Jefferson, Judge Jefferson's brother. He said he did. At this point counsel for defendant asked the court to have the district attorney make an offer; saying, without stating an objection, that the evidence was immaterial. The district attorney explained that defendant claimed he was "pressured" into paying the \$500 and that between the time he said he was solicited and the time he paid, he did not contact any of the named individuals "to whom a young lawyer might turn when confronted with a problem of this kind." The court, assuming an objection had been made, overruled it. Without objection defendant then testified he did not know Judge David Williams; he knew a number of deputy district attorneys, the United States attorney, the chief United States

narcotic officer; and that between the time he parted company with Nichols on the 28th until he paid the money, he did not contact any of the persons he had been asked about. Defendant claims the district attorney was guilty of prejudicial misconduct in conducting this line of inquiry; that all of the persons named are Negroes; that it was "an obvious attempt to call into play a racial issue." In the first place, there was no misconduct. No racial issue was called into play. All the men named by the district attorney are not Negroes. The Negroes mentioned are highly respected members not only of the Negro community but of the entire community. They are men to whom defendant might have thought he could go for advice if he was innocent. In his opening statement counsel for defendant stated defendant valued his standing with members of his race. While rather far-fetched, we cannot say, as a matter of law, that an inference could not be indulged that defendant's failure to contact a prominent member of the Negro race indicated a consciousness of guilt. In the second place, since there was no objection to the question as to whether Judge Jefferson was one of the leaders of the community of Negroes and to the questions asked after the district attorney's explanation, defendant is in no position to raise the point. *People v. Millum*, 42 Cal.2d 524, 526, 528, 267 P.2d 1039.

\* \* \*

The judgment and order denying a new trial are affirmed.

SHINN, P. J., and FORD, J., concur.



## TRIAL PROCEDURE Fair Trial—New York

### PEOPLE of the State of New York v. Fitzgerald DEVONISH.

Supreme Court, Special Term, New York County, Part I, May 16, 1960, 202 N.Y.S.2d 95.

**SUMMARY:** A Negro man, charged with violating a New York statute which prohibits keeping a place for game of policy, was arraigned in the gambler's part of a magistrate's court, where he could have been tried; but he chose to go to trial in a special sessions court. Thereafter, he moved the state supreme court for an order certifying that the action be prosecuted by indictment in a general sessions court, contending, *inter alia*, that the fact that no Negroes are justices of the special sessions would prevent him from obtaining a fair and impartial trial. The motion was denied, it not being claimed that any justice of the special sessions court had shown anti-Negro prejudice, nor that Negroes had not been accorded the same treatment as whites in that court.

GOLD, Justice.

This is a motion by a defendant, charged with violation of section 974 of the Penal Law, for an order certifying that the action presently pending in the Court of Special Sessions, New York County, be prosecuted by indictment in the Court of General Sessions, New York County.

Defendant was originally arraigned in the Gamblers Part of the Magistrate's Court. He could have been tried in that court, but chose to go to trial in the Court of Special Sessions. His present motion is based upon his claim that the "get tough policy" of the Court of Special Sessions makes it impossible for him to get a fair trial in that court. He also contends that the fact that no Negroes are justices of the Court of Special Sessions will prevent him, a Negro, from obtaining a fair and impartial trial in that court.

No showing is made that the stricter policy of the Court of Special Sessions, in relation to the prosecution of gamblers, includes the conviction of innocent men or any unfairness to defendants or partiality toward the prosecution. It may be

that sentences of those convicted are more severe than formerly. Defendant, however, has no vested right to the continuation of lenient sentences. Nor has defendant a right to have his trial transferred to a less severe court. Defendant's claim that he cannot get a fair and impartial trial in the Court of Special Sessions, because that court has no Negro justice, is not shown to have any merit. No claim is made that any justice of that court has in any way demonstrated anti-Negro sentiment or prejudice. No claim is made that Negroes have not been accorded the same treatment as whites in that court. If defendant's contention were to prevail, similar claims by persons of other colors, races and nationalities could also be successfully asserted. The result would be complete disruption of our court system.

The situation in which defendant finds himself, as previously observed, is one of his own choosing. Had he gone to trial in the Magistrate's Court, the grounds upon which he now objects to trial in Special Sessions would not have existed.

Motion denied.

## TRIAL PROCEDURE Juries—Arkansas

### Luther BAILEY v. Lee HENSLEE, Superintendent of Arkansas State Penitentiary.

United States District Court, Eastern District, Arkansas, Western Division, May 26, 1960, 184 F. Supp. 298.

**SUMMARY:** A Negro, convicted in 1956 of rape in an Arkansas state court in Pulaski County, appealed to the state supreme court, contending that the trial judge erred in refusing to

quash the jury panel because of the alleged systematic exclusion of Negroes. The court found no evidence of such exclusion and affirmed the conviction. 302 S.W.2d 796, 2 Race Rel. L. Rep. 997 (1957); *cert. denied*, 355 U.S. 851, 2 Race Rel. L. Rep. 1097 (1957). The accused then filed a petition in the trial court to have the conviction voided on the ground that he was denied the right to subpoena the jury commissioners; but the petition was denied, and the state supreme court affirmed, holding that the question of permitting the jury commissioners to testify had either been finally decided or had been waived in the first trial. 313 S.W.2d 388, 3 Race Rel. L. Rep. 758 (1958); *cert. denied*, "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court," 79 S. Ct. 101, 3 Race Rel. L. Rep. 868 (1958). The accused petitioned a federal district court in Arkansas for a writ of habeas corpus, but the writ was denied on the ground that petitioner had not exhausted the state remedies available to him. The court held that the question of whether the accused's constitutional rights were violated by the trial court's denial of process to compel the attendance of the jury commissioners was not brought to the attention of the state supreme court and was therefore waived. 168 F.Supp. 314, 4 Race Rel. L. Rep. 170 (E.D. Ark. 1958). On appeal, the Court of Appeals for the Eighth Circuit affirmed, holding that, if the ruling denying process on the jury commissioners was a technical denial of a constitutional right, there was no proof that the accused was injured by it. 264 F.2d 744, 5 Race Rel. L. Rep. 226 (8th Cir. 1959); *cert. denied*, "without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution," 80 S.Ct. 408, 4 Race Rel. L. Rep. 850 (1960). The accused again petitioned the federal district court for habeas corpus on the grounds now that the jury commissioners had during the 1956 term and from 1938 through March, 1960, systematically limited Negroes in selecting jury panel members for the criminal division of the court wherein he was tried, that no Negro jury commissioner had ever been appointed by a judge of that court, that there had been systematic exclusion of Negroes to serve on the jury panel for the civil divisions of that court, and that petitioner's Fourteenth Amendment rights were thereby violated. The federal court stated that the "precise question" before it was whether there had been discrimination in the jury panel which tried and convicted the petitioner. From the facts that when petitioner's jury was selected 13.3% of the county poll tax holders were Negroes and 8.33% of the panels initially selected and 8.1% of the panel from which petitioner's panel was selected were Negroes, the court held there was no *prima facie* case of discrimination. It was noted that there was no evidence to support the allegation that the commissioners had ever had an understanding to limit the number of Negro jurors; and that jury discrimination, if any, in the civil divisions of the court was not shown to be relevant to petitioner's case. It was held that the admitted failure to have Negro jury commissioners was not discrimination and that it was not adequately shown that the commissioners were unfamiliar with qualified Negroes in the county. Noting also that three Negroes had been selected on petitioner's jury panel, the court concluded that no racial discrimination had been practiced in the panel selection and that any disproportion of Negroes was not the result of racial considerations. The petition was therefore denied. The court also denied a certificate of probable cause for appeal; but it ordered the clerk to supply without charge, upon petitioner's request, such portions of the record "as he may reasonably require" to make application for a certificate of probable cause to the court of appeals, one of the judges of that court, or the circuit justice.

YOUNG, District Judge.

This is a petition for a writ of habeas corpus by the petitioner, Luther Bailey, a Negro under sentence of death by the State of Arkansas for the crime of rape committed on a white woman June 14, 1956. Petitioner was tried upon this

charge, convicted and sentenced in September of 1956.

I

It is the petitioner's contention here (as modified by stipulation of his counsel read into evidence):

(1) That Negroes were limited unduly and purposely in the selection of the members of the jury panel for the First Division (criminal) of the Pulaski County Circuit Court during the March 1956 term, and that such practice was the systematic plan for all jury commissioners from 1938 through the March 1960 term;

(2) No Negro jury commissioner had ever been appointed by any judge of the Pulaski County Circuit Court;

(3) There has been an intentional and systematic exclusion of Negroes to serve on the jury panel selected in the Second and Third Divisions (civil) of the Pulaski County Circuit Court, and that during the March 1956 term, 17 special jurors were called on one case (not that of petitioner) in the First, or Criminal, Division of the Court.<sup>1</sup>

(4) These alleged facts violate the Constitutional rights of the petitioner under the Fourteenth Amendment to the United States Constitution.

An order to show cause was issued to respondent upon this petition, upon which hearings were held on both April 1 and April 12, 1960. Evidence was received from the witnesses called by petitioner, who included the three jury commissioners for the March 1956 term of the First Division court, the term in which petitioner was tried. The court also considered the records, transcripts of testimony, and prior reported history, state and federal, of petitioner's trial and subsequent appeals. Upon this consideration of the petition, it is the decision of this court that petitioner has failed to prove his allegation of racial discrimination, either by exclusion or by limitation, in the selection of the petit jury panels. The petition for writ of habeas corpus is denied.

## II

After his conviction in September of 1956, petitioner appealed to the Arkansas Supreme Court, which affirmed. *Bailey v. State*, 1957, 227 Ark. 889, 302 S.W.2d 796. The Supreme Court of the United States denied certiorari. 1957, 355 U.S. 851, 78 S.Ct. 77, 2 L.Ed.2d 59.

Bailey's present counsel was appointed to

1. The Circuit Court of Pulaski County is divided into three divisions. The First Division, in which petitioner was tried, tries only criminal cases. The Second and Third Divisions handle the civil docket.

represent him by the Pulaski County Circuit Court more than a month before his trial. On the morning of the trial, his attorney filed a motion to quash the panel of regular and special panel of petit jurors for the alleged reason that the jury commissioners of the trial court in Pulaski County had purposely limited and restricted the number of Negroes serving on any petit jury panel from the years 1952 through 1956, and particularly as to the March 1956 term had selected only three Negroes out of the total of 36 selected to serve on the regular jury panel, and no Negroes out of 100 selected to serve on the special jury panel; and that such discrimination violated the Fourteenth Amendment. (Original trial transcript, pages 14-18.)

Petitioner then filed a petition for a writ of habeas corpus in the court of his conviction, alleging denial of compulsory process and systematic limitation of Negroes on the petit jury panel. His petition was later amended to raise only the question of denial of compulsory process.

### [Appeal to State Supreme Court]

Upon denial of his petition, Bailey again appealed to the Supreme Court of Arkansas, but the Court held that the point involved (denial of compulsory process) must necessarily have been raised and litigated, or waived, in the original trial proceedings. *Bailey v. State*, Ark. 1958, 313 S.W.2d 388. Certiorari was denied by the United States Supreme Court, 1958, 358 U.S. 869, 79 S.Ct. 101, 3 L.Ed.2d 101, "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court."

Then Bailey applied for a writ of habeas corpus in this court before J. Smith Henley, J. The basis for the writ was the claim that Bailey was denied compulsory process for obtaining witnesses in his favor in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Upon hearing of that petition, no compulsory process for attendance of witnesses was requested by Bailey, nor were witnesses, offers of proof, affidavits or other forms of additional proof introduced. The petition was denied. *Bailey v. Henley*, D.C.E.D.Ark.1958, 168 F. Supp. 314.

Petitioner Bailey's appeal of the lower court's denial of his petition was affirmed by the Eighth Circuit Court of Appeals. 1959, 264 F.2d 744.

That court, in its opinion, held that there was nothing to indicate that the jury commissioners excluded Negroes from the petit jury panel, and that no offer of testimony had been made by petitioner to support this allegation.

The court said, at page 748:

"After having made his record in the trial court, appellant (Bailey) deliberately omitted urging the question which he now seeks to urge, either in his motion for new trial or on appeal."

Petitioner again appealed to the United States Supreme Court, but certiorari was denied, 1960, 361 U.S. 945, 80 S.Ct. 408, 4 L.Ed.2d 364.

"without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

Shortly thereafter, Bailey filed this petition for a writ of habeas corpus with this court.

### III

It is true that such adverse State determinations, with the subsequent denials of certiorari by the United States Supreme Court, or the previous petition for habeas corpus denied by this court, does not prevent this court's reception of evidence or its evaluation of the prior record in determining the asserted federal grounds for habeas corpus. *Brown v. Allen*, 344 U.S. 443, at pages 458, 497-513, 73 S.Ct. 397, 437, at pages 407, 441-449, 97 L.Ed. 469. Nor can it be said to be res adjudicata, as the cases demonstrate.

### IV

It was admitted by respondent upon petitioner's request that:

(a) No Negro has served as a jury commissioner in Pulaski County since 1938.

(b) No Negro has served on a petit jury panel in the Third Division (civil) of the Pulaski County Circuit Court since 1948.

The following table (referred to as Table 1) has been prepared from the complete record before the court to allow a comparison of the various allegations and testimony concerning

Negro representation on the petit juries. The table reveals that most of the discrepancies in the evidence before the court are more apparent than real when considered against the complete record.

### V

Though petitioner was not entitled to any percentage of racial representation on the jury panel which tried him, or to representation, as such, at all, there must be neither inclusion nor exclusion because of race. To comply with the Constitutional requirements as to selection of jurors, race is an irrelevant factor. *Cassell v. State of Texas*, 1950, 339 U.S. 282, 287, 294, 70 S.Ct. 629, 94 L.Ed. 839 (concurring opinion); *Akins v. State of Texas*, 1945, 325 U.S. 398, at page 407, 65 S.Ct. 1276, at page 1281, 89 L.Ed. 1692 (Murphy, J. dissenting).

The federal court, however, does not serve as supervisor of jury commissioners in the performance of their duty. The court recognizes conscious decisions must be made in any system of jury selection not based upon pure chance, that practical considerations must necessarily be heeded, and that in any large county jury commissioners must of necessity have a somewhat limited acquaintance with most of the people eligible for jury duty. In Pulaski County, the largest in the State of Arkansas, there were 64,537 holders of poll tax receipts in the year 1955, from which the March 1956 term of jurors was necessarily selected under Arkansas law.

#### [Jury Commissioners' Testimony]

The jury commissioners for the March 1956 term in the First Division of the Pulaski County Circuit Court testified that they selected jurors for the regular and alternate panel whom they thought to be qualified, capable and desirable, without consideration of race. They testified that they were, each of them, familiar with qualified Negroes, but did not select Negroes with the intention of having any particular number, but did select three Negroes on the regular panel.<sup>2</sup>

2. In considering this case, the court has ignored any distinction between the regular panel and the alternate panel. Though Negroes seem to have been omitted from all alternate panels save one, in a county the size of Pulaski the panels actually serve, in effect, as one panel of 36, rather than as a panel of 24 with 12 alternates; the large number of cases tried make it almost certain that all will be called upon to serve.



Table of Negro Jurors  
First Division (Criminal) of Pulaski Circuit Court  
March 1952 through March 1956 Court Terms

Allegations of Motion to Quash Panel 9/19/56		Testimony of Court Clerk 9/19/56		Bailey's Exhibit No. 1 4/1/60		Corrections To Exhibit No. 1	
		Ordinary	Special	Regular	Alternate	Regular	Alternate
March 1952	2	2		0	0		
September 1952	1	1		0	0		
March 1953	2	2		2	0		
September 1953	3	2	3 of 50; 0 of 5 of 21 (Note 2)	1	0		
March 1954	2	2	0 of 5 of 24 (Note 3)	1	0	2	0 (Corrected by Rosteck 4/12/60)
September 1954	2	2	0 of 7 of 100 (Note 4)	1	0	1	1
March 1955	3	3	4 of 100, one person called (Note 5)	3	0		
September 1955	3	3	0 of 1 of 100 (Note 6)	3	0		
March 1956	3 (Note 1)	3	(See Note 7)	2	0	3	(Corrected by stipulation of parties 4/1/60)

Note 1. Alleged that no Negroes selected out of the "100" on the special panel for the March 1956 term. Further alleged that there had never been more than four Negroes on a petit jury panel, and that only once.

Note 2. Three Negroes on special panel of 50. A supplemental panel of 21 names was made, from which five persons were called, none of whom were Negroes. No indication of race of those not called.

Note 3. Special panel of 24, from which five persons were called, all of whom were white. No indication of race of those not called.

Note 4. Special panel of 100, from which seven persons were called, all of whom were white. No indication of race of those not called.

Note 5. Special panel of 100, four of whom were Negroes. One person white, served from this panel.

Note 6. Special panel of 100, from which one person, white, served.

Note 7. A total of five special panels, with approximately 450 names, were selected. Apparently none were Negroes. It is uncertain how many were actually called. Fourteen on the first two special panels were called in the Bailey case. Eighteen persons from the Third Division Panel were used for the Leggett trial, none of whom were Negroes.

The precise question before the court is whether there was discrimination in the selection of the jury panel which tried and convicted petitioner. Of course, the question is not foreclosed by the answers of the jury commissioners; the discrimination alleged may be established by evidence showing disproportionate representation over such a period of time that the burden is shifted to the State to show that it is not the result of systematic limitation. *Cassell v. State of Texas*, and *Akins v. State of Texas*, supra; *Avery v. State of Georgia*, 1953, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; *Patton v. State of Mississippi*, 1947, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76.

#### [Racial Discrimination Not Proved]

The court does not believe that the evidence offered in this case of racial representation on the jury panels in the First Division from March 1952 through March 1956 establishes such a pattern of disproportionate representation as to compel the finding that it must necessarily have

been achieved through discriminatory limitation upon the basis of race.

In 1955, the poll tax year from which petitioner's jury was selected, Negroes constituted 13.3% of the poll tax holders in Pulaski County. Negroes constituted 8.33% of the regular and alternate jury panels initially selected, and 8.1% of the panel from which petitioner's jury was chosen. We do not believe that such evidence is sufficient to support a prima facie case of discrimination. In arriving at these conclusions:

(1) That there was no discrimination in the selection of the panel of the 1956 March term, and

(2) That a prima facie case of discrimination has not been made by a comparison of jury panels through a number of prior years,

the court has considered the following factors:

A. As to the special panel for the March 1956 term, the record discloses some confusion. Petitioner's Exhibit No. 1 indicates that 450

jurymen were selected, but other testimony indicates that all of these persons may not have appeared in court, and one of the special panels may not have been opened. None of the special jurors seem to have been Negroes, although the evidence is somewhat uncertain on this point; all were required initially for the Leggett case, on appeal *Leggett v. State*, 1957, 227 Ark. 393, 299 S.W.2d 59, tried prior to petitioner, Bailey, but at the same term of court. The record discloses that the first special panel had 50 names, the second special panel 149, and that these two panels contain the only special jurymen involved in any way in the selection of petitioner's jury.

*[Petitioner's Jury]*

Petitioner's jury was selected from a list of 37 jurors, seven from the first special panel, seven from the second special panel, and the remaining 23 from the regular panels. So far as is shown by the record, none of the special jurors other than the 14 just mentioned ever served again during the 1956 March term after the conclusion of the Leggett case. The only relation of these special jury panels to petitioner's case arises from the fact that these 14 jurors served as part of the panel from which his jury was selected.

Further, it cannot be said that the record supports the contention that Negroes are normally discriminated against by exclusion or limitation as regards special panels in the First, or Criminal, Division of the Pulaski Circuit Court. It is established that prior to 1956 in several of the years Negroes were called on such special panels. One of the problems in regard to these special panels is that the race of the individual jurors is usually not designated, making it impossible to determine the race of special panel members not called on to appear. Mr. Rosteck testified, referring to the special panels at the term in which Bailey was tried, that it was impossible to determine whether the jurors not reporting were white or colored, because these special lists (referring particularly to special panel number one and special panel number two) show only name, address and telephone number of the jurors, with no designation of race. The names of the jurors on special panels are put in sealed envelopes and opened only on order of the court. This is apparently not the case with the regular panels, where the race of the Negro and white jurors is in most instances

indicated by the jury commissioner when the lists of such regular jurors are submitted to the court.

B. No evidence has been introduced by petitioner in support of his allegation that there was an understanding on the part of the jury commissioners, either those for the term of March 1956 or for prior terms, to limit the number of Negro jurors.

C. As has been stated, the Circuit Court of Pulaski County is divided into three divisions, each of which selects its own jury panel. The First Division tries only criminal cases, while the Second and Third handle the civil docket. One of the contentions of petitioner is that there has been an intentional and systematic exclusion of Negroes to serve on the jury panels in these civil divisions, and that 17 special jurors from the panel of the Third Division were called in one case in the First, or Criminal, Division.

*[Civil Divisions' Panels]*

It appears to be true that no Negro has been selected on any of the jury panels of these two civil divisions since 1939; however, it is undisputed that the only case that any of the jurors chosen for the civil divisions have been used in the criminal division was in the 1956 March term in the trial of Leggett, who was a white man, when 17 jurors from the Third Division were temporarily "borrowed" by the First Division for the purpose of selecting the Leggett jury. After the Leggett case, these jurors were returned to the Third Division and were not recalled to the First Division. The record shows that this is the only instance that any jurors selected for the civil divisions have ever been used in the criminal division. The relevance of jury discrimination, if any, in the civil divisions to petitioner's case is not established.

D. Over the objection of the State, evidence of Negro representation on jury panels subsequent to March 1956 was received for its relevance, if any, in the establishment of a prima facie showing of discrimination. Petitioner presented evidence that several Negroes selected as jurors had served on more than one panel. However, only one Negro had served twice before petitioner's trial (Mr. D. B. Lacefield, in March of 1951 and September of 1955); there had been no other repetition of Negro jurors between March of 1951 and March of 1956, and

none of the three Negroes on petitioner's jury panel had served prior to that term.

E. The failure to have Negro jury commissioners is not discrimination. *Moore v. Henslee*, 8 Cir., 1960, 276 F.2d 876. Nor does the court think that there is a sufficient showing of unfamiliarity with qualified Negroes to bring this case within the rule of *Cassell v. State of Texas*, supra. All the jury commissioners testified they have lived in Pulaski County for a long time and were acquainted with the names of many Negroes they would consider qualified if found to have a poll tax for 1955. Three of the jurors they selected were Negroes. All the commissioners were engaged in business which brought them into contact with Negroes. We do not understand that the familiarity with eligible jurors of all races and creed required of jury commissioners must necessarily proceed from social or personal contacts. It is the knowledge, not its source, which is important.

#### [No Racial Discrimination]

The court has come to the conclusion that there was no racial discrimination practiced in the selection of the jury panel which tried petitioner. Any disproportion of Negro representation on such panel or in the total group from which the panel was actually selected does not seem to have been the result of consideration of race, either in the selection or non-selection of particular jurors.

#### VI

Our examination of the record has led us to the same conclusion reached by the courts that have previously considered this case. We believe that petitioner was afforded a fair trial, that his constitutional rights were observed, and that he has had a full measure of judicial review of his conviction. Judge J. Smith Henley found that Bailey was not denied a fair trial, that the trial judge appeared to have been careful to protect all of the legitimate rights of Bailey, and that his conviction was supported by the evidence. *Bailey v. Henslee*, D.C.E.D.Ark. 1958, 168 F.Supp. 314. The Eighth Circuit Court of Appeals held:

"We have examined the entire record with great care and are convinced that the guilt of the defendant was proved by the evidence beyond a reasonable doubt, and if the ruling denying him compulsory process

for the production of the jury commissioners as witnesses was a technical denial of a Constitutional right, there is no proof that he was injured thereby, and he has clearly waived this Constitutional right \* \* \* We are convinced that he had a fair trial."

*Bailey v. Henslee*, 1959, 264 F.2d 744, at pages 748-749 (Gardner, Chief Judge).

Nearly four years have elapsed since petitioner's original trial. The same question attempted to be raised by petitioner in this proceeding was first presented by him at his trial four years ago. The question now raised by petitioner was not presented to this court in his previous petition for federal habeas corpus although no reason is assigned for this failure. We do not believe that this piecemeal presentation of alleged errors is helpful in maintaining public confidence in the administration of justice. Any defendant is entitled to utilize fully the procedures established for reviewing and correcting alleged errors in his trial, but it does not seem improper to demand that he do so in an orderly and efficient fashion. If, through ingenuity of counsel, alleged errors may be continually devised and litigated through all steps of appeal, it is difficult to see how the public interest in the efficient punishment of crime is to be served.

No additional facts have been discovered since the petitioner's original trial and no reason is shown why all of the contentions now presented should not have been long since disposed of—in fact, we think they have been disposed of. Of course, every man is entitled to a fair trial, and this precious right should be jealously guarded. However, after petitioner has had full opportunity to present his defense, and full review has been made by the appellate courts, what purpose is served by interminable delay in the final adjudication of his case? Such delays cast doubt, and some even say discredit, on the administration of justice.

#### VII

It is, therefore, considered, ordered and adjudged that the order to show cause heretofore entered be, and hereby is, vacated; that the petition for a writ of habeas corpus be, and hereby is, denied; that certificate of probable cause for the appeal of the case will be denied petitioner; but that the Clerk of this Court will be ordered to supply without charge, upon re-

quest by petitioner, such portions of the record as he reasonably may require to make application for a certificate of probable cause to one of

the judges of the Court of Appeals for this Circuit, or to the Court of Appeals itself, or to the Circuit Justice.

## TRIAL PROCEDURE

### Juries—Illinois

#### PEOPLE of the State of Illinois v. Millard FORD.

Supreme Court of Illinois, June 14, 1960, 168 N.E.2d 33.

**SUMMARY:** A man convicted in an Illinois state court of murder brought error to the state supreme court contending, inter alia, that he was prejudiced by the fact that the first eight jurors accepted to try his case were Negroes, by improper remarks made by the state's attorney during the voir dire, and by the length of the voir dire. The judgment was affirmed. The court held that, since the record did not indicate that defendant exhausted his peremptory challenges, he was in no position to complain concerning jury selections. It was also held that, there being no evidence of any attempt systematically to exclude white jurors as such, it could not be said that defendant was denied any constitutional rights in that regard. The state's attorney's remarks, although deemed to be ill-advised, were held not to warrant a reversal; and the duration of the voir dire was not considered to be prejudicial error.

#### DAILY, Justice.

Millard Ford, defendant, was indicted for the fatal shooting of Walter Unger, and after a jury trial in the circuit court of Pulaski County, was found guilty of murder and sentenced to the penitentiary for a term of 99 years. Upon writ of error he now contends . . . (2) that the selection of jurors was contrary to statute, . . .

Further objecting to the jury, defendant argues that he was prejudiced by the fact that the first eight jurors accepted were Negroes, by improper remarks made by the State's Attorney during the *voir dire*, and by the length of the *voir dire* itself. It is true that the first eight jurors picked in this case were Negroes, and that after two of those jurors had expressed reluctance about serving upon an all colored jury and the defense counsel had asked that Negroes be excluded from the third jury panel, the court sustained the defendant's motion and thereafter only white jurors were accepted. We fail, however, to see how defendant was prejudiced by this action. Since the record does not indicate that he exhausted his peremptory challenges, he was as much responsible for picking the first

eight jurors as was the People, and the remaining jurors were selected in accordance with his own request. We have frequently stated that a defendant, having failed to use his peremptory challenges, is in no position to complain concerning jury selections. *Siebert v. People*, 143 Ill. 571, 32 N.E. 431; *Wilson v. People*, 94 Ill. 299; *Ochs v. People*, 124 Ill. 399, 16 N.E. 622. Furthermore, there being no evidence of any attempt to systematically exclude white jurors as such, it cannot be said that defendant was denied any constitutional rights in this regard. *Eubanks v. State of Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991. Following defense counsel's oral motion for exclusion of further Negro jurors, during which time, in their presence, the defense counsel indicated he was acting to protect the jurors from embarrassment, the State's Attorney remarked: "We are the judges of whether people are embarrassed or not. It is very strange we have developed an interest insofar as knowing whether people have sense enough to know what they are doing or not." The statement, although ill-advised, was prompted by and in opposition to defendant's stated position, and was objected to, not at the time it was made, but after considerable evidence was heard upon defend-



ant's motion. Under these circumstances, a reversal upon this point is unwarranted. *Clark v. People*, 224 Ill. 554, 79 N.E. 941; *People v. Monday*, 280 Ill. 32, 117 N.E. 286; *People v. Fricano*, 302 Ill. 287, 134 N.E. 735. Neither during the trial itself nor in his post-trial motion did defendant urge error resulting from the duration

of the *voir dire*, and we know of no instance in which that alone has been considered as prejudicial error.

\* \* \*

The judgment of the circuit court of Pulaski County is therefore affirmed.

Judgment affirmed.

## TRIAL PROCEDURE

### Prosecutor's Summation—New Jersey

STATE of New Jersey v. William DUNLAP.

Superior Court of New Jersey, Appellate Division, June 9, 1960, 161 A.2d 760.

**SUMMARY:** Two Negro men were prosecuted in a New Jersey state court for kidnapping and raping a white woman. In his summation at the trial's conclusion, the prosecutor several times referred to the fact that on the night in question defendants were out looking for a white girl. Defendants were convicted and sentenced to concurrent prison terms of 30 to 50 years for kidnapping and 25 to 30 years for rape. One of them appealed on the ground, *inter alia*, that the prosecutor's remarks emphasized racial differences and were prejudicial and inflammatory, thereby causing the verdict to be tainted. The superior court, appellate division, affirmed. It was pointed out that the remarks were based upon a fact in evidence, supported by defendants' statements and the testimony of another witness. Finding the prosecutor's references not prejudicial nor inflammatory, the court reaffirmed the principle that, while a prosecutor must discuss only the facts shown or reasonably suggested by the evidence, he may sum up the state's case graphically, forcefully, and with feeling. It was also pointed out that the trial court in referring to the racial differences of the defendants and the complaining witness had charged the jury to disregard any bias or prejudice, and that the defense had made no objection to the prosecutor's summation nor requested any special instructions from the court.

GOLDMAN, S. J. A. D.

The Gloucester County grand jury brought separate indictments against defendant for kidnapping (N.J.S. 2A:118-1 N.J.S.A.) and rape (N.J.S. 2A:138-1, N.J.S.A.) of L. F. on February 1, 1959. Benjamin Devine, who was with defendant, was similarly indicted. The two were tried together, found guilty after an extended jury trial, and sentenced to State Prison terms of 30 to 50 years on the kidnapping charge and 25 to 30 years for rape, the sentences to run concurrently.

Defendant next complains that prejudicial remarks by the prosecutor, emphasizing racial differences, tainted the verdict. In his summation the prosecutor several times referred to the fact that on the night in question defendant and

Devine—they were Negroes—were out looking for a white girl. This, it is claimed, was inflammatory, citing *State v. D'Ippolito*, 19 N.J. 540, 117 A.2d 592 (1955), and *State v. Bogen*, 13 N.J. 137, 98 A.2d 295 (1953). It is to be noted that defense counsel at no time made objection to these remarks.

In his statement Devine said that he and defendant "talked about picking up a white girl. \* \* \* We decided we were going to pick up a white girl. \* \* \* We pulled into a lovers' lane to try and pick up a white girl." There were similar references in defendant's statement. The prosecutor's remarks were therefore based upon a fact in evidence.

One of the State's witnesses, Blair, had testified that he and his girl had been parked along

the road where the kidnapping occurred. A Ford car of the same description as defendant's automobile had pulled up behind them and blocked off the driveway. Two men got out and one tried to get in on the driver's side and the other on the passenger's side. The doors were locked so they tried the rear doors, and while they were doing this Blair started up the car and drove away. He recognized Devine as one of the men. The prosecutor's references to defendant and Devine having been out looking for a white girl tied in with this testimony and refuted their allegations that they were specifically looking for L. F.

*[References not Prejudicial]*

We find the prosecutor's references not prejudicial or inflammatory. As was recently said in *State v. Johnson*, 31 N.J. 489, 510, 158 A.2d 11, 22 (1960):

"Generally a prosecutor, in his summation, may discuss only the facts shown or reasonably suggested by the evidence. \* \* \* But so long as he confines himself to the facts and reasonable inferences, what he says in discussing them, by way of comment, denunciation or appeal, will afford no ground for reversal. \* \* \* The prosecutor is entitled to sum up the State's case graphi-

cally and forcefully. It is unreasonable to expect that criminal trials will be conducted without some show of feeling. Defense counsel traditionally make dramatic appeals to the emotions of the jury. In these circumstances, a prosecutor cannot be expected to present the State's case in a manner appropriate to a lecture hall. \* \* \*"  
(Citations omitted.)

The trial court carefully charged the jury to disregard any bias or prejudice and made it clear that the case should be decided solely on the evidence. He pointed out that there was a white complaining witness and two Negro defendants. He stressed that the defendants were entitled to all legal safeguards, and prejudice had no place in the jury's deliberations. Not only did the defense make no objection to the prosecutor's summation, but it requested no special instruction from the court.

The credibility to be accorded Miss F.'s testimony, as well as that of the other State witnesses and the accused, was for the jury to decide. Unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion, we should not disturb it. R.R. 1:5-1(a); *State v. Haines*, 18 N.J. 550, 565, 115 A.2d 24 (1955).

Affirmed.

The American Medical Association is a non-profit corporation organized for the purpose of promoting the interests of the medical profession and the public. It is composed of members who are physicians, dentists, and other health care professionals. The Association's primary concern is the advancement of the medical profession and the improvement of the health of the people.

The Association's activities are carried out through its various departments and committees. These include the Department of Legislation, the Department of Education, and the Department of Public Relations. The Association also publishes the *Journal of the American Medical Association*, which is one of the most widely read medical journals in the world.

The Association's efforts are aimed at the improvement of the medical profession and the health of the people. It does this by promoting the highest standards of medical practice, by advocating for the interests of the medical profession, and by providing information and education to the public. The Association's work is essential to the advancement of the medical profession and the improvement of the health of the people.

### MEMBERSHIP

The Association's membership is composed of individuals who are interested in the advancement of the medical profession and the improvement of the health of the people. There are three classes of membership: Regular, Life, and Honorary. Regular members are those who are active in the Association's work. Life members are those who have made a significant contribution to the medical profession. Honorary members are those who are distinguished in their field.

The Association's membership is open to all who are interested in the advancement of the medical profession and the improvement of the health of the people. There are no restrictions on the basis of race, religion, or political affiliation. The Association's membership is a privilege, and it is one that should be held with pride and responsibility.

### CONSTITUTION

The Association's Constitution is the governing document of the organization. It sets forth the Association's purpose, its objectives, and its methods of operation. The Constitution is a living document, and it is subject to change and amendment. The Association's members have the right to propose amendments to the Constitution, and they have the right to vote on such proposals.

### BY-LAWS

The Association's By-Laws are the rules and regulations that govern the Association's internal affairs. They are designed to ensure the efficient and effective operation of the Association. The By-Laws are subject to change and amendment, and they are subject to the approval of the Association's members.

# LEGISLATURES

## EDUCATION

### Public Schools—Louisiana

Act No. 333 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, makes it unlawful for any person, firm, or corporation to furnish free textbooks or other school supplies to an integrated school. The use of state funds is also prohibited for lunch programs or any other kind of recognition of or assistance to integrated schools. For judicial comment on this act, see *Bush v. Orleans Parish School Board*, 5 Race Rel. L. Rep. 655, *supra*.

AN ACT to prohibit the furnishing of free school books, school supplies or other school funds or assistance to integrated schools; and to provide penalties for the violation of provisions of this Act.

WHEREAS it is of the utmost importance to all the people of Louisiana, that the State exercise its police power to promote the health, morals, better education, peace and good order of the people by requiring the maintenance of separate schools for the education of white and colored children, and the State should not contribute any assistance to any school which may be racially integrated under any circumstances, therefore:

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** No free school books or other school supplies shall be furnished, nor shall any State funds for the operation of school lunch programs, or any other school funds be furnished, or any assistance or recognition be given to any elementary or secondary school in the State of Louisiana which may be racially integrated, or which shall teach white and colored children in the same school, under any circumstances.

**Section 2.** Any person, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined or imprisoned in the discretion of the court.

## EDUCATION

### Public Schools—Louisiana

Act No. 492 of the 1960 Acts of the Louisiana legislature, approved by the governor July 9, 1960, provides for a study by the state board of education of the general efficiency of the state education system, and prohibits local boards from making any general reallocation of students pending such study and further legislation. General criteria are specified in the Act for the guidance of local boards in individual reassignment cases, including:



**availability of transportation, effect of the admission of new pupils on the established academic program, scholastic aptitude and relative intelligence or mental energy of the pupil, the psychological effect upon the pupil of attendance at the school, etc.**

AN ACT to amend and re-enact sub-part B-1 Assignment, transfer and continuance of pupils (new), Sections 101, 102, 103, 104, 105, 106, 107, 108, 109, and 110, of title 17 of the Louisiana Revised Statutes of 1950.

*Be it enacted by the Legislature of Louisiana*

**Section 1.** Sub-Part B-1. Assignment, Transfer and continuance of pupils (new), Sections 101, 102, 103, 104, 105, 106, 107, 108, 109, and 110, of Title 17 of the Louisiana Revised Statutes of 1950, is hereby amended and re-enacted to read as follows:

Sub-Part B-1. Assignment, transfer, and continuance of pupils (new)

§ 101. Findings.

The legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexible and selective procedure for the establishment of schools, facilities and curricula and as to the qualification and assignment of pupils.

The legislature also recognizes the necessity for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good will indispensable to the willingness of its citizens and taxpayers to continue an educational system as a public function, and also as a vital function of the sovereignty and police power of the state.

§ 102. Continuing studies of educational system

To the ends aforesaid, the state board of education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies

and recommendations by the school authorities, the legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

§ 103. Local boards not required to make general reallocations

Pending further studies and legislation to give effect to the policy declared by this Sub-Part, the respective parish and city school boards, hereinafter referred to as "local school boards," are not required to make any general reallocation of pupils heretofore entered in the public school system and shall have no authority to make or administer any general or blanket order to that end from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any individual or group in any school or facility without a finding by the local board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the test of the public and education policy governing the admission and placement of pupils in the public school system prescribed by this Sub-Part.

§ 104. Authority and responsibility of local boards; factors to be considered

Subject to appeal in the limited respect herein provided, each local board shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and shall prescribe rules and regulations pertaining to those functions. Subject to review by the board as provided herein, the board may exercise this responsibility directly or may delegate its authority to the superintendent of education or other person or persons employed by the board. In the assignment,

transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, in accordance with such rules and regulations, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

Local school boards may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth

§ 105. Admission to schools in adjoining parishes

Local school boards may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining parishes and for transfer of school funds or other payments by one board to another for or on account of such attendance.

§ 106. Objections and requests; hearings and investigations.

A parent or guardian of a pupil may file in writing with the local school board objections to the assignment of the pupil to a particular school, or may request by petition in writing, assignment or transfer to a designated school or to another school to be designated by the board. Unless a hearing is requested, the board shall act upon the same within 30 days, stating its conclusion. If a hearing is requested, the same shall be held beginning within 30 days from receipt by the board of the objection or petition at a time and place designated by the board.

The board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the board. The school board is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings, and to take testimony, and to make a report of the hearings to the entire board for its determination. No final order shall be entered in such case until each member of the school board has personally considered the entire record.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

For the purpose of conducting hearings or investigations hereunder, the board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the state of Louisiana to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the parish to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as are allowed for the service of subpoenas

from a district court. In the event any person fails or refuses to obey a subpoena issued hereunder, any district court of this state within the jurisdiction of which the hearing is held or within the jurisdiction of which said person is found or resides, upon application by the board or its representatives, shall have the power to compel such person to appear before the board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof. Witnesses at hearings conducted under this Sub-Part shall be entitled to the same fees as provided by law for witnesses in the district courts, which fees shall be paid as a part of the costs of the proceeding.

§ 107. Withdrawal of children from schools where races are commingled; aid for education

Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the school board. If in connection therewith a requested assignment or transfer is refused by the board, the parent or guardian may notify the board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

§ 108. Findings and actions of board as final; appeals

The findings of fact and action of the board shall be final except that in the event that the pupil or the parent or guardian, if any, of any minor or, if none, the custodian of any such minor shall, as next friend, file exception before such board to the final action of the board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, or any right under the laws of Louisiana, and (if) the board shall not, within fifteen days reconsider its final action, an appeal may be taken from the final action of the board, on such ground alone, to the district court of the judicial district in which the school

board is located, by filing with the clerk of said court within thirty days from the date of the board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the Federal Constitution, or State law, accompanied by bond with sureties approved by the clerk of said court conditioned to pay all costs of appeal if the same shall not be sustained. A copy of such petition and bond shall be filed with the president of the board. The filing of such a petition for appeal shall not suspend or supersede an order of the board; nor shall the court have any power or jurisdiction to suspend or supersede an order of the board issued under this Sub-Part before the entry of a final decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for appeal, after a preliminary hearing, and upon a prima facie showing by the petitioner that the board has acted unlawfully to the manifest detriment of the child who is the subject of the proceeding.

On such appeal the district court may, as in other cases, summon a jury for the determination of any issue or issues of fact presented. Appeal may be taken from the decision of the district court in the same manner as appeals may be taken in other suits, either by the appellant or by such board.

§ 109. Appearance of attorney general; costs

The board before whom any objection or proceeding with respect to the placement of pupils is pending may, upon authorization in writing of a majority of the board, request the attorney general of Louisiana to appear in such proceedings as *amicus curiae* to assist the board in the performance of its judicial functions and to represent the public interest. Expenses of court reporters, subpoenas, witness fees and other costs of such proceedings approved by the board shall be the obligation of the city or parish involved, and shall be paid from the public school funds of such city or parish.

§ 110. Immunity of school boards and agents.

No school board or member thereof, nor its agents or examiners, shall be answerable

to any charge of libel, slander, or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of proceedings or deliberations provided for under this Sub-Part.

**Section 2.** If any section, paragraph, sentence, clause or word of this Act shall be held unconstitutional, the same shall not affect any other part, portion or provision of this Act, but such other part shall remain in full force and effect.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

## EDUCATION

### Public Schools—Louisiana

Act No. 495 of the 1960 Acts of the Louisiana legislature, approved by the governor July 9, 1960, authorizes the governor to close all public schools when any public school or school system is threatened with integration. The Act also provides for the protection of school properties and for their transfer. For judicial comment on this Act, see *Bush v. Orleans Parish School Board*, 5 Race Rel. L. Rep. 655, *supra*.

AN ACT to authorize the Governor of this state to preserve the peace and promote the interest, safety and happiness of all the people by closing all public schools when any public school or school system is, by court order, racially integrated in whole or in part, by providing protection for the rights of personnel and property of such closed schools; by providing for the reopening of such schools; by providing for the permanent closing of the schools; and by providing for the alienation of school properties to private persons; and to repeal all laws in conflict herewith.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** When the Governor has under any provision of law taken over the control management and administration of any public school or schools as the result of a court decreeing that a School Board or School Boards shall place into operation in the schools under its or their jurisdiction a plan of racial integration, or decreeing that the court itself shall place into operation a plan of racial integration, irrespective of any other power conferred upon him by the law the Governor of this state in order to preserve the peace and to promote the interest, safety and happiness of all the people may order all public schools in this State closed.

**Section 2.** The Governor shall take necessary action to protect all public school property of all schools ordered closed in compliance with Section 1 hereof.

**Section 3.** The Governor shall, whenever in his judgment he determines that peace and good order can be maintained and all schools operated as racially separate institutions, order the reopening of all schools closed as above provided and the legal authorities of such closed schools shall resume their duties and functions as public school employees.

**Section 4.** If the Governor of this State orders all public schools closed under the Provisions of Section 1 hereof, and after a reasonable time determines that all the schools may not be reopened and operated on a racially segregated basis, he may declare the schools permanently closed.

**Section 5.** The Governor shall direct the parish and city School Boards to protect the rights and privileges of sick leave, sabbatical leave, all other types of leave, tenure, retirement, and any other rights and privileges of teachers, bus drivers, and all other school employees whose employment shall be affected by the closing of such schools; and provided further that the Governor shall direct the parish and city School



Boards to continue salary payments and other benefits of such personnel for the remainder of the school year, except where they have entered a business or accepted other full time private employment. In the event any such employee shall enter a business or accept full time private employment and his annual wages, salary or income therefrom is less than that which he would have earned as a public school employee, the parish or city School Board for which he was working at the time of severance, shall pay to him the difference between his actual income and that which he would have earned as a public school employee during the school year in which the school was closed. In any such cases the parish or city School Board may at any time require reasonable proof of any former employee's status with respect to employment and/or income and withhold any payment herein provided until such proof has been furnished.

If the public schools of this State are closed under the provisions of this Act during a vacation period before a new school year is begun, the provisions of this Act shall apply for the period which would have been the following school year.

**Section 6.** The Governor shall direct the parish and city School Boards and the State Board of Education to recognize all children in schools closed under the provisions of Section 1 hereof as being in actual attendance until such time as he orders the schools reopened or permanently closed. The parish or city school Boards shall

have authority to promote any or all such students in accordance with rules and regulations adopted by the State Board of Education.

**Section 7.** Any parish and city School Board may sell, lease, or otherwise dispose of, at public or private sale, for cash or on terms of credit, any real or personal property used in connection with the operation of any school or schools within its jurisdiction which has been permanently closed by order of the Governor as provided herein, to any private agency, group of persons, corporation, or cooperative bona fide engaged in the operation of a private non-sectarian school, when in the opinion of such Board the best interest of the school system would be served by such action. In any such sale, lease, or disposal the consideration provided, whether represented by cash or credit, shall be equal to the reasonable value of the property, which, in case of a sale, shall be not less than the replacement costs of the property sold.

**Section 8.** If any Section or part of any Section of this Act is declared to be unconstitutional or invalid, the remainder of this Act shall not thereby be invalidated.

**Section 9.** All laws or parts of laws in conflict herewith be and the same are hereby repealed.

**Section 10.** This statute shall become effective immediately upon its enactment.

## EDUCATION

### Public Schools—Louisiana

Act No. 496 of the 1960 Acts of the Louisiana legislature, approved by the governor July 9, 1960, vests in the legislature the exclusive right to reclassify public schools for the use of another race. It also provides for the governor to take control of a school when a school board has been ordered to desegregate. For judicial comment on this Act, see *Bush v. Orleans Parish School Board*, 5 Race Rel. L. Rep. 655, *supra*.

AN ACT to establish a method of classification of public school facilities in all parish and city school systems to provide for the exclusive use of school facilities therein by non-Negro and Negro children respectively and the mode of changing the classification of any school

therein; to provide further for the governor to assume from the school board or school boards the exclusive control management and administration of said schools under certain conditions; and to provide for matters related thereto.

*Be it enacted by the Legislature of the State of Louisiana:*

**Section I.** Those public schools in any parish or city school system of the State of Louisiana presently being utilized in the education of non-Negro children through the twelfth grade of school shall from the effective date of this statute be utilized solely and exclusively in the education of non-Negro children, unless otherwise classified by the Legislature as provided in Sections III and IV hereof.

**Section II.** Those public schools in such parish or city school systems presently being utilized in the education of children of the Negro race through the twelfth grade of school shall from the effective date of this statute be utilized solely and exclusively in the education of children of the Negro race unless otherwise classified by the Legislature as provided in Sections III and IV hereof.

**Section III.** The President of the Senate shall appoint two (2) members from that body, and the Speaker of the House shall appoint two (2) members from the House of Representatives who shall serve as the Special School Classification Committee of the Louisiana Legislature, which Committee shall have the power, authority, and responsibility of classifying any new public school erected or instituted, or of re-classifying any existing public school, in any system covered by the other provisions of the Act, so as to designate the same for the exclusive use of non-Negro children, or for the exclusive use of Negro children. Such classification or re-classification shall be by a yea or nay vote, the majority of which shall be cast affirmatively for such classification or re-classification, and the proceedings thereof shall be recorded in the minutes of the meeting of the Committee and shall be for inspection as public records, preserved and made available for inspection as public records, as provided by law.

Any such classification or re-classification shall be subject to confirmation by the Legislature of Louisiana at its next regular session, said confirmation to be accomplished by concurrent resolution of the two houses of the Legislature.

Each member of the Special School Classification Committee shall draw, at the rates paid members of the Louisiana Legislature while in regular session, for each day that the Special School Classification Committee is in

actual session in the performance of its duties as required herein, a per diem and traveling expenses, not to exceed one round trip for each Committee meeting. Such per diem and traveling expenses shall, in case of the Senate members of the Committee, be paid by the Louisiana Senate, and in case of the House members of the Committee, by the Louisiana House of Representatives, out of funds appropriated by the Louisiana Legislature to each branch thereof for its operating expenses.

**Section IV.** However, the State of Louisiana reserves to itself exclusively through its Legislature, the right to institute or reclassify schools on a racially integrated basis and the Special School Classification Committee shall have no authority whatsoever in this regard. Racial integration shall only be affected in the public schools pursuant to a plan approved and validated by concurrent resolution of the two houses of the Legislature.

**Section V.** Where, prior to the Legislature of the State of Louisiana having classified or re-classified public schools in order to put into operation a plan of racial integration therein, any court shall decree, or prior to the effective date of this Act shall have decreed, as the result of a suit at law or in equity in which the State of Louisiana has not been made or properly made a defendant that a school board or school boards shall place into operation in the schools under its or their jurisdiction a plan of racial integration, or that the court itself shall place into operation a plan of racial integration, in that event the Governor, in his sovereign capacity, shall supercede such school board or school boards affected by the decree, as of the effective date of said decree, and shall take over in its or their stead the exclusive control, management and administration of the public schools under its or their jurisdiction, on a racially segregated basis until such time as the Legislature shall classify or reclassify schools to place into operation therein a plan of racial integration.

**Section VI.** Any suit contesting any of the provisions of this Act may be brought only against the State of Louisiana with the consent of the Louisiana Legislature first obtained as provided by the Constitution of the State of Louisiana, and no State, Parish or Municipal Board, Agent or Officer shall have any right or authority to sue or be sued or to stand in judgment on any

question affecting the validity of this Act or any of its provisions.

**Section VII.** If any one or more sections, provisions or clauses of this Act shall be held to be unconstitutional or ineffective for any reason, the remainder hereof shall remain in full force and effect.

**Section VIII.** This statute, being emergency legislation, shall have the effect of law from the date of its enactment.

**Section IX.** All laws or parts of laws in conflict herewith, to the extent of the conflict only, particularly Section 321 of Title 17 of the Revised Statutes of 1950, are hereby repealed.

## EDUCATION

### Public Schools—Louisiana

Act No. 542, of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, directs the governor to close any public school in the state in case of disorder, riots or violence, or when necessary to prevent such disorder, and to reopen such schools when their normal operation can be resumed. For judicial comment of this act, see *Bush v. Orleans Parish School Board*, 5 Race Rel. L. Rep. 655.

AN ACT to amend Title 17 of the Louisiana Revised Statutes of 1950 by adding thereto a new section to be designated as R.S. 17:169, to provide for the closing by the Governor of any public school in the State of Louisiana in case of disorder, riots, or violence or to prevent disorder, riots, or violence, to provide for the protection of leave, tenure, pay, etc. of teachers and other employees affected thereby, and to provide for the re-opening thereof.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 169 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

Section 169. Closing of a public school by the governor in case of disorder, riots, or to prevent disorder, riots, or violence, and providing for the re-opening thereof.

The governor shall close any public school in the State of Louisiana when the operation thereof is threatened, interfered with, or disrupted by disorder, riots, or violence, or in his judgment the closing of such school is deemed necessary to prevent disorder, riots, or violence, that would threaten, interfere with, or disrupt the operation thereof.

The governor shall reopen a school closed under the provisions hereof, and it shall resume operation under the supervision and control of its parish or city school board

when the governor deems it no longer necessary to keep the school closed in order to prevent disorder, riots, or violence from threatening, interfering with, or disrupting the operation of the school.

The governor shall direct the parish and city school boards to protect the rights and privileges of sick leave, sabbatical leave, all other types of leave, tenure, retirement, and any other rights and privileges of teachers, bus drivers, and all other school employees whose employment shall be affected by the closing of such schools; and provided further that the governor shall direct the parish and city school boards to continue salary payments and other benefits of such personnel for the remainder of the school year, or until the school is reopened as a public school under the provisions hereof, whichever occurs sooner, except where such personnel has entered a business or accepted other full time private employment. In the event any such employee shall enter a business or accept full time private employment and his annual wages, salary or income therefrom is less than that which he would have earned as a public school employee, the parish or city school board for which he was working at the time of severance, shall pay to him the difference between his actual income and that which he would have earned as a public school employee

during the school year in which the school was closed. In any such cases the parish or city school board may at any time require reasonable proof of any former employee's status with respect to employment and/or income and withhold any payment herein provided until such proof has been furnished.

The governor shall direct the parish and city school boards and the State Board of Education to recognize all children in schools closed under the provisions hereof as being in actual attendance until such time as he orders the schools reopened in ac-

cordance with the provisions hereof. The parish or city school boards shall have authority to promote any or all students in accordance with rules and regulations adopted by the State Board of Education.

**Section 2.** If any provision, paragraph, clause, sentence, or word of this Act is declared to be unconstitutional or invalid, the remaining provisions, paragraphs, sentences, clauses, or words shall not thereby be invalid but shall remain in full force and effect.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

## EDUCATION

### Trade and Special Schools—Louisiana

Act No. 579 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, directs the governor to close any state trade or special school in case of disorder, riots or violence, or when necessary to prevent such violence, and to reopen such schools when their normal operation can be resumed.

AN ACT to provide for the closing of any trade or special school operated by the State of Louisiana in case of disorder, riots or violence, or to prevent disorder, riots or violence; to provide for the protection of leave, tenure, pay, etc. of teachers and other employees affected thereby; and to provide for the reopening thereof.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** The governor shall close any trade or special school operated by the State of Louisiana when the operation thereof is threatened, interfered with, or disrupted by disorder, riots, or violence or in his judgment the closing of such school is deemed necessary to prevent disorder, riots, or violence, that would threaten, interfere with or disrupt the operation thereof.

The governor shall reopen any school closed under the provision hereof and it shall resume operation under the supervision and control of the State Board of Education, when the governor deems it no longer necessary to keep the school closed in order to prevent disorder, riots,

or violence from threatening, interfering with, or disrupting the operation of the school.

The governor shall direct the State Board of Education to protect the rights and privileges of sick leave, sabbatical leave, all other types of leave, tenure, retirement and any other rights and privileges of teachers, bus drivers and all other school employees whose employment shall be affected by the closing of schools under the provisions hereof; and provided further that the governor shall direct the State Board of Education to continue salary payments and other benefits of such personnel for the remainder of the school year, or until the school is reopened and operated by the State of Louisiana under the provisions hereof, whichever occurs sooner, except where such personnel have entered a business or accepted full time private employment. In the event any such employee shall enter a business or accept full time private employment and his annual wages, salary or income therefrom is less than that which he would have earned as a public school employee, the State Board of Education shall pay to him the differ-



ence between his actual income and that which he would have earned as a trade or special school employee during the school year in which the school was closed. In any such cases, the State Board of Education may at any time require reasonable proof of any former employee's status with respect to employment and/or income and withhold any payment herein provided until such proof has been furnished.

**Section 2.** If any provision, paragraph, clause, sentence, or word of this Act is declared to be unconstitutional or invalid, the remaining provisions, paragraphs, sentences, clauses, or words shall not thereby be invalidated, but shall remain in full force and effect.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

## EDUCATION

### Trade and Special Schools—Louisiana

Act No. 580 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, provides that current Negro and non-Negro classification of all trade and special schools in Louisiana is to be maintained. Procedures are provided for reclassification by the legislature. The statute allows the governor to take control of such schools if integration is ordered without previous legislative classification. See *Angel et al. v. Louisiana State Board of Education*, 5 Race Rel. L. Rep. 652.

AN ACT to establish a method of classification of public trade and special school facilities operated by the State of Louisiana, to provide for the exclusive use of such facilities by non-negro and negro students respectively and the mode of changing the classification of such schools; to provide for the operation by the Governor of Louisiana in his sovereign capacity of any such school or schools and to provide for matters related thereto.

*Be it enacted by the Legislature of Louisiana:*

**Section I.** Those trade and special schools presently being operated by the State of Louisiana for the education of non-negro students shall from the effective date of this act be utilized solely and exclusively in the education of non-negro students unless otherwise classified by the Legislature as provided in Sections 3 and 4 hereof.

**Section II.** Those trade and special schools presently being operated by the State of Louisiana for the education of students of the negro race shall from the effective date of this statute be utilized solely and exclusively in the education of students of the negro race unless otherwise classified by the Legislature as provided in Section 3 and 4 hereof.

**Section III.** The Special School Classification Committee of the Louisiana Legislature, as created by Act of the Regular Session of 1960, shall have the power, authority, and responsibility of classifying any new trade or special school erected or instituted, or of re-classifying any existing trade or special school, operated by the State of Louisiana, so as to designate the same for exclusive use of non-negro students or for the exclusive use of negro students. Such classification or re-classification shall be by a yeay or nay vote, the majority of which shall be cast for such classification or re-classification and the proceedings thereof shall be recorded in the minutes of the meeting of the Committee and shall be preserved and made available for inspection as public records, as provided by law.

Any such classification or reclassification shall be subject to confirmation by the Legislature of Louisiana at its next regular session, and confirmation to be accomplished by concurrent resolution of the two houses of the Legislature.

Each member of the Special School Classification Committee shall draw, at the rates paid members of the Louisiana Legislature while in regular session, for each day that the Special School Classification Committee is in actual session in the performance of its duties as required herein, a per diem and traveling expenses, not

to exceed one round trip for each Committee meeting. Such per diem and traveling expenses shall, in case of the Senate members of the Committee, be paid by the Louisiana Senate, and in case of the House members of the Committee, by the Louisiana House of Representatives, out of funds appropriated by the Louisiana Legislature to each branch thereof for its operating expenses.

**Section IV.** However, the State of Louisiana reserves to itself exclusively through its Legislature, the right to institute or reclassify trade and special schools operated by the State of Louisiana on a racially integrated basis and the Special School Classification Committee shall have no authority whatsoever in this regard. Racial integration shall only be effected in the trade and special schools, operated by the State of Louisiana pursuant to a plan approved and validated by concurrent resolution of the two houses of the Legislature.

**Section V.** Where, prior to the Legislature of the State of Louisiana having classified or reclassified trade and special schools operated by the State of Louisiana in order to put into operation a plan of racial integration therein, any court shall decree, or prior to the effective date of this act shall have decreed, as the result of a suit at law or in equity in which the State of Louisiana has not been made or properly made a defendant, that the state board of education shall place into operation in the trade or special schools under its jurisdiction a plan of racial integration, or that the court itself shall place

into operation a plan of racial integration, in that event the Governor, in his sovereign capacity, shall supersede such school board affected by the decree, as of the effective date of said decree, and shall take over in its stead the exclusive control, management and administration of the trade or special schools under its or their jurisdiction, on a racially segregated basis until such time as the Legislature shall classify or re-classify such schools to place into operation therein a plan of racial integration.

**Section VI.** Any suit contesting any of the provisions of this Act may be brought only against the State of Louisiana with the consent of the Louisiana Legislature first obtained as provided by the Constitution of the State of Louisiana, and no state board of education, its agents or its officers, shall have any right or authority to sue or be sued or to stand in judgment on any questions affecting the validity of this Act or any of its provisions.

**Section VII.** If any one or more sections, provisions or clauses of this Act shall be held to be unconstitutional or ineffective for any reason, the remainder hereof shall remain in full force and effect.

**Section VIII.** This statute, being emergency legislation, shall have the effect of law from the date of its enactment.

**Section IX.** All laws or parts of laws in conflict herewith, to the extent of the conflict only, are hereby repealed.

## EDUCATION

### Trade and Special Schools—Louisiana

Act No. 581 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, prohibits the furnishing of school supplies to, or otherwise assisting or recognizing, trade or special schools which are integrated, unless such integration has been validated by concurrent resolution of both houses of the Louisiana legislature. [See *Angel et al. v. Louisiana State Board of Education*, 5 Race Rel. L. Rep. 652, *supra*.]

AN ACT to prohibit the furnishing of school supplies or other school funds to trade or special schools operated by the State of Louisiana

which have been racially integrated without approval and validation of such racial integration by concurrent resolution of the two

Houses of the Louisiana Legislature as provided by law, and to provide penalties for the violation of the provisions of this Act.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** No school supplies shall be furnished for or any assistance or recognition given to any trade or special school operated by the State of Louisiana which has been racially integrated without approval and validation of such racial integration by concurrent resolution of the two houses of the Louisiana Legislature as provided by law.

**Section 2.** Any person, firm, or corporation violating any provisions of this Act shall be deemed guilty of a misdemeanor, and upon con-

viction thereof by a court of competent jurisdiction for each such violation shall be fined not less than Five Hundred Dollars nor more than One Thousand Dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or fined and imprisoned as above, at the discretion of the court.

**Section 3.** If any part or provision of this Act shall be held to be unconstitutional, the same shall not have the effect of invalidating any other part or provision of the Act, and such other part or provisions not affected by such ruling shall continue in full force and effect.

**Section 4.** All laws or parts of laws in conflict herewith be and the same are hereby repealed.

## EDUCATION

### Trade and Special Schools—Louisiana

Act No. 582 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, allows the governor to close all trade and special schools when any such schools are ordered integrated, to provide for protection of the buildings and personnel, to declare them permanently closed, to reopen them, and to alienate the property. See *Angel et al. v. Louisiana State Board of Education*, 5 Race Rel. L. Rep. 652.

AN ACT to authorize the Governor of this state to preserve the peace and promote the interest, safety and happiness of all the people by closing all trade and special schools operated by the State of Louisiana when any such trade or special school is, by court order, racially integrated in whole or in part, by providing protection for the rights of personnel and property of such closed schools; by providing for the reopening of such schools; by providing for the permanent closing of the school; and by providing for the alienation of school properties to private persons; and to repeal all laws in conflict herewith.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** When any Court has ordered or orders any trade or special school operated by the State of Louisiana integrated as to race, whether all classes or grades in said schools or school sys-

tem are ordered integrated or only one class or grade or certain classes or grades thereof ordered integrated, the Governor of this State, in order to preserve the peace and to promote the interest, safety and happiness of all the people, may order all such schools in the State closed.

**Section 2.** The Governor shall take necessary action to protect all school property of all schools ordered closed in compliance with Section 1 hereof.

**Section 3.** The Governor shall, whenever in his judgment he determines that peace and good order can be maintained and all trade and special schools operated as racially separate institutions, order the reopening of all such schools closed as above provided and the legal authorities of such closed schools shall resume their duties and functions as public school employees.

**Section 4.** If the Governor of this State orders all trade and special schools closed under the Provisions of Section 1 hereof, and after a reasonable time determines that all the schools may not be reopened and operated on a racially segregated basis, he may declare the schools permanently closed.

**Section 5.** The Governor shall direct the state board of education to protect the rights and privileges of sick leave, sabbatical leave, all other types of leave, tenure, retirement, and any other rights and privileges of teachers, bus drivers, and all other school employees whose employment shall be affected by the closing of such schools; and provided further that the Governor shall direct the state board of education to continue salary payments and other benefits of such personnel for the remainder of the school year, except where they have entered a business or accepted other full time private employment. In the event any such employee shall enter a business or accept full time private employment and his annual wages, salary or income therefrom is less than that which he would have earned as a public school employee, the state board of education shall pay to him the difference between his actual income and that which he would have earned as a trade or special school employee during the school year in which the school was closed. In any such cases the state board of education may at any time require rea-

sonable proof of any former employee's status with respect to employment and/or income and withhold any payment herein provided until such proof has been furnished.

**Section 6.** The state board of education may sell, lease, or otherwise dispose of, at public or private sale, for cash or on terms of credit, any real or personal property used in connection with the operation of any trade or special school or schools within its jurisdiction which has been permanently closed by order of the Governor as provided herein, to any private agency, group of persons, corporation, or cooperative bona fide engaged in the operation of a private nonsectarian school, when in the opinion of such board the best interest of the students therein would be served by such action. In any such sale, lease, or disposal the consideration provided, whether represented by cash or credit, shall be equal to the reasonable value of the property, which, in case of a sale, shall be not less than the replacement costs of the property sold.

**Section 7.** If any Section or part of any Section of this Act is declared to be unconstitutional or invalid, the remainder of this Act shall not thereby be invalidated.

**Section 8.** All laws or parts of laws in conflict herewith be and the same are hereby repealed.

**Section 9.** This statute shall become effective immediately upon its enactment.

## EDUCATION

### Age, Race Certification—Louisiana

Act No. 541 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, provides that a child applying for admission for the first time to a public or private school in the state be required to present a copy of his official birth certificate to the principal. If the certificate does not specify age and race of the child, school boards are authorized to require additional proof as to those factors.

AN ACT. To amend and re-enact paragraph A of Section 167 of Title 17 of the Louisiana Revised Statutes of 1950 relative to the certification of a child's age and race upon entering a parish or city school system or private school in the State of Louisiana for the first time, providing methods of certification, and

providing that parish and city school boards and private schools may require the submission of additional evidence as to age and race.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Paragraph A and the title of Section 167 of the Louisiana Revised Statutes of



1950 are hereby amended and re-enacted to read as follows:

Section 167. Certification of child's age upon entering a parish or city school system or private school for the first time; proof of age to qualify for athletic event participation

A. All children, upon entering a parish or city school system or private school in the State of Louisiana for the first time shall be required to present a copy of their official birth record to the school principal. Only records from the local or state registrar of

vital statistics will be accepted for children born in Louisiana. Birth verification forms issued by the local registrar of the parish of birth shall be valid and acceptable for entry into parish or city school systems or private schools and for qualifying for all types of athletic participation where proof of age is required, provided that parish and city school boards may require the submission of additional evidence as to age and/or race, where such is not conclusively established by the birth certificate.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

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## BIRTH CERTIFICATES

### Delayed Issuance—Louisiana

Act No. 410 of the 1960 session of the Louisiana legislature, approved by the governor on July 3, 1960, specifies the parties defendant for a suit to issue a delayed birth certificate for a person over 12 years of age, and requires that the petition contain a letter from the State or New Orleans Bureau of Vital Statistics to the effect that those offices have no file on record for the petitioner.

An Act to amend and re-enact Sections 332 and 335 of Chapter 2, Title 40 of the Louisiana Revised Statutes of 1950 which provides for the filing of a delayed birth certificate on persons born in Louisiana and who are over twelve (12) years of age.

*Be it enacted by the Legislature of Louisiana that*

**Section 1.** Sections 332 and 335 of Chapter 2 of the Louisiana Revised Statutes of 1950 be amended and re-enacted to read as follows:

Section 332. The suit shall be filed contradictorily to the district attorney either in the parish of residence or the parish of birth except where the suit is filed in the parish of Orleans in which instance the State Board of Health or the City of New Orleans Board of Health, whichever has jurisdiction, shall be made a party to the suit and provided

that in all cases the State Board of Health or the City of New Orleans Board of Health shall be served with a copy of plaintiff's petition. Persons born in Louisiana and residing outside the state must file suit in the parish of birth. The petition shall be accompanied by a letter from the office of the State Bureau of Vital Statistics or the New Orleans Bureau of Vital Statistics, whichever has jurisdiction, bearing the raised imprint of the seal of the Board and the said letter shall be made a part of the suit and shall state to the effect that the petitioner has no record on file.

Section 335. All certified copies of such delayed birth registration shall be issued by the State Board of Health or the City of New Orleans Board of Health, whichever has jurisdiction.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

## CHURCH PROPERTY

### Transfer of Control—Louisiana

Act No. 346 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, permits the transfer of control of properties to the local beneficiaries of certain non-profit groups when such beneficiaries shall determine by a two-thirds vote that a deep-seated and irreconcilable hostility exists between them and those in control of the administration of the trust. This action is limited to situations where all, or a substantial part, of the corpus of the disputed property was contributed by the local beneficiaries.

AN ACT to provide a method of transfer of ownership of certain properties from any non-profit educational, charitable or religious corporation, organization, or association to the local beneficiaries thereof, to prescribe the conditions upon which such transfers may be made, and to set forth matters relative thereto.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** When used in this Act, the following words and phrases shall have the meanings ascribed to them hereby:

(a) *Trust.* For the purposes of this Act, the term "Trust" shall be limited to express or implied trusts created for educational, charitable or religious purposes where all or a substantial part of the corpus thereof shall have been contributed by the local beneficiaries (as herein-after defined), or by their predecessor beneficiaries; and where said corpus shall consist of real or personal property situated within the State of Louisiana. This Act shall have no application to private trusts, either express or implied; to trusts administered by any public governmental authority; to Roman Catholic educational, charitable or religious trusts; or to trusts for educational, charitable or religious purposes where all or a substantial portion of the corpus shall not have been contributed by the local beneficiaries thereof, or by their predecessor beneficiaries.

(b) *Local beneficiaries.* For purposes of this Act, the term "local beneficiaries" shall mean those persons residing within the State of Louisiana who shall have contributed (or whose predecessor beneficiaries shall have contributed) all or a substantial part of the corpus of the Trust, as above defined, and who shall locally, immediately, and directly enjoy the benefits of such Trust.

(c) *Majority of beneficiaries.* For purposes of

this Act, the term "majority of beneficiaries" shall be defined as sixty-six and two-thirds per cent (66 2/3%) of the adult local beneficiaries residing within the State of Louisiana and enjoying locally and immediately and directly the benefits of such Trust.

**Section 2.** When a majority of the local beneficiaries of any educational, charitable or religious Trust (all as hereinabove defined) shall determine that there exists a deep-seated and irreconcilable hostility or tension between them and any or all of the trustees or others in authority exercising control over the administration of such Trust; then, and in such event, said majority of the local beneficiaries may file a petition in the District Court of the parish wherein any part of the corpus of said Trust is situated, setting forth the grounds for relief as stated herein and praying for a decree of the court discharging all existing trustees and all others in authority exercising control over the administration of such trust (by whatever name designated) and for the appointment of other trustees who shall, upon their appointment and qualification in conformity with the terms of the decree of the court, thereupon become vested with complete control and authority over the corpus of said Trust. All successor-trustees so appointed and qualified shall be citizens of the State of Louisiana, residing within the jurisdiction of the court appointing them, and who shall be a local beneficiary as defined in Sub-section (b) of Section 1 of this Act. However, before entering a decree removing the existing trustees and all others in authority exercising control over the administration of such Trust and appointing successor-trustees, the Court shall first find affirmatively that the conditions set forth in this Section as alleged in the petition actually exist. The acting trustees and all others in authority with respect to said Trust shall be made parties defendant to the petition; shall be summoned in the manner provided by law; and shall be afforded every

statutory right to plead, answer or except to the petition filed against them, and to appear and be heard in opposition thereto.

**Section 3.** The provisions of this Act shall be severable, and in the event any phrase, clause,

sentence or provision of this Act be held to be unconstitutional, such shall not affect or invalidate the remaining portion thereof.

**Section 4.** All laws or parts of laws in conflict herewith are hereby repealed.

## CONSTITUTIONAL AMENDMENTS

### Recall of Officials—Louisiana

Act No. 630 of the 1960 session of the Louisiana legislature is a joint resolution proposing an amendment to the state constitution which would require the recall of members of any agency ordering the integration of a tax-supported facility. The amendment would also require that such integrated facility no longer be a function of the government. The provisions of the amendment specifically exclude application to parish and city school boards and school districts. In the November, 1960, election, the amendment was approved by a vote of 284,987 for, 151,685 against.

#### ACT NO. 630

#### A JOINT RESOLUTION

Proposing an amendment to Article X of the Constitution of Louisiana by adding thereto a new section to be designated as Section 5.1 to require that when a tax supported facility of any political subdivision of the state which by law was segregated as to race when the tax was authorized is ordered integrated, the appointment of all members of the authority ordering the integration shall be recalled, and the facility declared no longer a governmental function and the outstanding taxes used to pay outstanding debts and retire outstanding indebtedness with any surplus going into the general fund of the political subdivision; providing that outstanding bonds on the facility shall not be affected; and providing that the provisions hereof shall not apply to parish and city school boards, school districts, school sub-districts, and consolidated school districts.

WHEREAS, Louisiana has always maintained a policy of segregation of the races, and

WHEREAS, it is the intention of the citizens of this sovereign state that such a policy be continued.

Section 1. Be it resolved by the Legislature of the State of Louisiana, two-thirds of the members elected to each House concurring, that

there shall be submitted to the electors of the State of Louisiana for their approval or rejection in the manner provided by law, a proposal to amend Article X of the Constitution of Louisiana by adding thereto a new Section to be designated as Section 5.1, and is to read as follows:

§ 5.1 Action to be taken upon the integration of any tax supported facility of any political subdivision of the state which was segregated as to race by law when the tax was authorized.

Section 5.1. Whenever one or more facilities of government for the maintenance of which a tax has been voted by any political subdivision of the state and which was segregated according to race by existing law at the time of the election at which the tax was authorized, and ordered integrated by the order or action of any commission, board or other authority, the governing authority of the political subdivision shall recall the appointment of all members of the commission or board, regardless of the term for which they or any of them were appointed, and shall declare such facility or facilities to be no longer a function of the government of the political subdivision. All taxes due and owing for the said facility or facilities at the time of such action shall be collectible and the proceeds derived therefrom shall be used by the governing authority of the political subdivision for the liquidation of all outstanding obligations of said facility or facilities and then for the retirement of any bonded indebtedness of the facility or

facilities, and any surplus remaining thereafter shall be deposited in the general fund of the governing authority of the said political subdivision, to be used for general government operation.

The provisions of this Section shall not be construed to nor shall they affect any outstanding bonds of any facility or facilities affected by this Section. The governing authorities of the political subdivision in which said facility or facilities are located shall continue the collection of all taxes previously voted and levied for the retirement of all outstanding bonds of such facility or facilities and shall liquidate them at the time and in the manner provided at the time of their issuance.

The provisions of this section shall not apply to parish and city school boards, school districts, school sub-districts and consolidated school districts.

Section 2. This proposed amendment shall be submitted to the electors of the State of Louisiana at the next election for Representatives in Congress to be held in Louisiana on the first

Tuesday next following the first Monday of November, 1960.

Section 3. On the official ballot to be used at said election there shall be printed:

FOR the proposed amendment to Article X, of the Louisiana Constitution, providing for the recall of members of any authority which orders to be integrated any tax supported facility segregated by law according to race when the tax was authorized, and for abandonment of such facility as a governmental function.

and also:

AGAINST the proposed amendment to Article X, of the Louisiana Constitution, providing for the recall of members of any authority which orders to be integrated any tax supported facility segregated by law according to race when the tax was authorized, and for abandonment of such facility as a governmental function.

Each elector voting on this proposition for so amending the Constitution shall indicate his vote relative thereto in the manner provided by the General Election Laws of the State of Louisiana.

## CRIMINAL LAW

### Aggravated Battery—Louisiana

Act No. 69 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, makes the following conduct a felony when a riot ensues in which persons are killed, maimed or injured: Crowding or congregating around a public place or private business and refusing to disband when directed; the making of insulting or obscene remarks in public places; and the refusal to leave the premises of another when requested to do so by proper authority. The same conduct is declared to be a misdemeanor when no violence results. Labor union activity, when directed toward specified union goals, is expressly excepted from the operation of the Act.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto two Sections to be designated as Sections 34.1 and 103.1 to declare certain acts to be misdemeanors and to declare those same acts to be felonies in the event that any person is maimed, killed or injured as a result of such acts, and to provide penalties therefor.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Sections 34.1 and 103.1 of Title 14 of the Louisiana Revised Statutes of 1950 are hereby enacted to read as follows:

§ 34.1 Aggravated battery resulting from a misdemeanor.

A. Whoever with intent to provoke a



breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) Crowds or congregates with others providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, boat, ferry or other water craft or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refuses to leave the premises of an-

other when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of aggravated battery, provided such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured.

B. Whoever commits an aggravated battery as defined herein shall be imprisoned for not more than ten years.

#### § 103.1 Disturbing the peace

A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or ob-

structs or interferes with another or others, or

(3) while in or on any public bus, taxicab, boat, ferry or other water craft or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters of things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace.

B. Whoever commits the crime of disturbing the peace as defined herein shall be punished by a fine of not more than two

hundred dollars, or imprisonment in the parish jail for not more than four months, or by both such fine and imprisonment.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## CRIMINAL LAW

### Disturbing the Peace—Louisiana

Act No. 70 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, defines the offense of "disturbing the peace," and makes it a misdemeanor for any person, while on the premises of another, to interfere with customers or other persons having business there. Labor union activities are specifically excepted.

AN ACT to amend and re-enact Section 103 of Title 14 of the Louisiana Revised Statutes of 1950, relative to disturbing the peace, to make it a misdemeanor for any person who is on the premises of another to interfere with customers or other persons on said premises for the purpose of engaging in business transactions with the owner or operator of such business as herein provided, to prescribe punishment therefor and for related purposes.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 103 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§ 103. Disturbing the peace

A. Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

- (1) Engaging in a fist encounter; or
- (2) Using of any unnecessarily loud, offensive, or insulting language; or
- (3) Appearing in an intoxicated condition; or
- (4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or
- (5) Holding of an unlawful assembly; or
- (6) Interruption of any lawful assembly of people; or
- (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.

Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars or imprisoned for not more than ninety days, or both.

B. Any person or persons, providing how-

ever nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, while in or on the premises of another, whether that of an individual person, a corporation, a partnership, or an association, and on which property any store, restaurant, drug store, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty parlor, or any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, who shall:

(1) prevent or seek to prevent, or interfere or seek to interfere with the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with customers or prospective customers or other members of the public who may then be in such building, or

(2) prevent or seek to prevent, or interfere or seek to interfere with other persons who are expressly or impliedly invited upon said premises, or with prospective customers coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises, shall be guilty of disorderly conduct and disturbing the peace, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the parish jail for not more than six months, or by both such fine and imprisonment.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications and to this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## CRIMINAL LAW

### Illegitimate Children—Louisiana

Act No. 75 of the 1960 session of the Louisiana legislature, approved by the governor on June 14, 1960, makes it a crime to give birth to two or more illegitimate children. The mother and father are both declared to be guilty, and a birth certificate listing the child as illegitimate is considered as prima facie evidence of the crime.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new section, to be designated as R.S. 14:79.2, to define the crime of conceiving and giving birth to an illegitimate child, to provide for the guilt of the mother and father of such a child, to provide for prima facie proof of illegitimacy, and to provide penalties for the crime.

*Be it enacted by the Legislature of Louisiana:*

Section 1. Section 79.2 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 79.2 Conceiving and giving birth to an illegitimate child

Conceiving and giving birth to two or more

illegitimate children is hereby declared to be a crime. Both the father and mother of such children shall be equally guilty of the commission of this crime. Each such birth shall be a separate violation hereof.

A birth certificate showing a child to be illegitimate shall be prima facie proof of that fact.

Whoever commits the crime of conceiving and giving birth to two or more illegitimate children shall be fined not more than one thousand dollars, or imprisoned, for not more than one year, or both.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such

invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## CRIMINAL LAW

### Obstructing Public Passages—Louisiana

Act No. 80 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, provides penalties for wilfully obstructing the free use of public sidewalks, streets, bridges, etc. The activities of labor unions seeking better wages, hours, or working conditions are specifically exempted from provisions of the Act.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new section to be designated as R.S. 14:100.1, to prohibit the obstruction of public passageways or passages and to provide penalties for violation of the prohibition.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 100.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

#### 4. OBSTRUCTING PUBLIC PASSAGES

##### § 100.1 Obstructing public passages

No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building structure, water craft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

Providing however nothing herein contained shall apply to a bona fide legitimate

labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

Whoever violates the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both fined and imprisoned.

This section shall not be applicable to the erection or construction of any barricades or other forms of obstructions as a safety measure in connection with construction, excavation, maintenance, repair, replacement or other work, in or adjacent to any public sidewalk, street, highway, bridge, alley, road, or other passageway, nor to the placing of barricades or other forms of obstruction by governmental authorities, or



any officer or agent thereof, in the proper performance of duties.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## CRIMINAL LAW

### Perjury—Louisiana

Act No. 68 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, makes it a crime for any person wilfully and knowingly to make or cause to be made false statements to agencies or officers of the United States to the effect that the state of Louisiana or its officials have deprived or are about to deprive them or others of their constitutional rights.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new Section to be designated as Section 126.2 to prohibit persons from making to certain departments or agencies or officers of the United States false statements to the effect that they or others have been or are about to be denied or deprived of certain constitutional rights by certain Louisiana agencies, officers or by the State of Louisiana; to provide a penalty therefor; and for related purposes.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 126.2 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 126.2. False statements concerning denial of constitutional rights

No person shall wilfully and knowingly, whether orally or in writing, make or cause to be made to any agency, board, commission member, officer, official, appointee, employee or representative thereof, of the executive, legislative or judicial department of the United States or any subdivision thereof, which may be now in existence, or who may be now appointed, or hereafter created or appointed, including but not

limited to any commissioner, referee or voting referee now appointed or who may be hereafter appointed by any court of the United States or any judge thereof, and further including but not limited to any member of the Federal Bureau of Investigation or any agent or representative, investigator or member of the Commission of Civil Rights of the United States, or the Advisory Committee or Board of the Commission of Civil Rights of the United States appointed in and for the state of Louisiana, any false or fictitious or fraudulent statement or statements, or to use any false writing or document asserting or claiming that such person or persons, or any other person or persons have been or are about to be denied or deprived of any right, privilege or immunity granted or secured to them, or to any of them, by the United States Constitution and laws, or by the Louisiana Constitution and laws, by any officer, agency, employee, representative, board or commission or any member thereof of the state of Louisiana, or of any parish or municipality of the state of Louisiana, or of any other political subdivision of the state of Louisiana, or by the state of Louisiana.

Any person or persons violating the provisions of this Act shall, upon conviction thereof, be punished by imprisonment for not less than one year nor more than five years with or without hard labor, or by a fine of not less than one hundred dollars nor more than one thousand dollars or by both such fine and imprisonment.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given

effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## CRIMINAL LAW

### Resisting an Officer—Louisiana

Act No. 76 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, defines the offense of resisting an officer, and provides for maximum punishment of \$300 fine and 6 months imprisonment.

#### ACT NO. 76

AN ACT to amend and re-enact Section 108 of Title 14 of the Louisiana Revised Statutes of 1950, relative to resisting an officer

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 108 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

#### § 108. Resisting an officer

Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification and connotation mean:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

Whoever commits the crime of resisting an officer shall be fined not more than Three Hundred Dollars, or imprisoned for not more than six months, or both.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

## CRIMINAL MISCHIEF

### Trespass—Louisiana

Act No. 77 of the Acts of the 1960 Louisiana legislature, approved by the governor June 22, 1960, amends and re-enacts that state's statute defining and prohibiting criminal mischief. Included is a provision making it illegal to take temporary possession of any part or parts of a place of business, or to remain in a place of business after the person in charge has ordered the offender to leave.

AN ACT to amend and re-enact Section 59 of Title 14 of the Louisiana Revised Statutes of 1950 relative to the definition and penalty of criminal mischief and repealing all laws or parts of laws in conflict herewith.

*Be it enacted by the Legislature of the State of Louisiana:*

**Section 1.** Section 59 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

**Section 59. Criminal mischief**

Criminal mischief is the intentional performance of any of the following acts:

- (1) Tampering with any property of another, without the consent of the owner, with the intent to interfere with the free enjoyment of any rights of anyone thereto, or with the intent to deprive anyone entitled thereto of the full use of the property; or
- (2) Giving of any false alarm of fire; or
- (3) Driving of any tack, nail, spike or metal over one and one-half inch in length into any tree located on lands belonging to another, without the consent of the owner, or without the later removal of the object from the tree; or
- (4) The felling, topping, or pruning of

trees or shrubs within the right of way of a state highway, without the prior written approval of the director of the department of highways or his representative; or

(5) Giving of any false report or complaint to a sheriff, or his deputies, or to any officer of the law relative to the commission of, or an attempt to commit, a crime; or

(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

Whoever commits the crime of criminal mischief shall be fined not more than \$500.00 or imprisoned for not more than one year, or both.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 3.** Due to the nature of this legislation and the conditions existing in the State of Louisiana this Act is declared an emergency and becomes effective immediately upon passage by the Legislature and signature of the Governor of the State of Louisiana.

## ELECTIONS

### Qualification of Candidates—Louisiana

Act No. 538 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, requires every candidate for public office to specify his race on all forms connected with nomination and candidacy, and on ballots.

AN ACT to amend Title 18 of the Louisiana Revised Statutes of 1950 by adding thereto a new Section to be designated as R.S. 18:1174.1,

to provide for the designation of the race of each candidate for public office on applications for, notifications or declarations of, can-

didacy, and on certificates of nomination, nomination papers, certifications of names of candidates made to the Secretary of State, and on ballots.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 1174.1 of Title 18 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

Section 1174.1. Designation of race of candidates on paper and ballots

A. Every application for or notification or declaration of candidacy, and every certificate of nomination and every nomination paper filed in any state or local primary, general or special election for any elective office in this state shall show for each candidate named therein, whether such candidate is of the Caucasian race, the Negro race or other specified race.

B. Chairmen of party committees, party executive committees, presidents of boards of supervisors of election or any person or persons required by law to certify to the Secretary of

State the names of candidates to be placed on the ballots shall cause to be shown in such certification whether each candidate named therein is of the Caucasian race, Negro race or other specified race, which information shall be obtained from the applications for or notifications or declarations of candidacy or from the certificates of nomination or nomination or as the case may be.

C. On the ballots to be used in any state or local primary, general or special election the Secretary of State shall cause to be printed within parentheses ( ) beside the name of each candidate, the race of the candidate, whether Caucasian, Negro, or other specified race, which information shall be obtained from the documents described in Sub-section A or B of this Section. The racial designation on the ballots shall be in print of the same size as the print in the names of the candidates on the ballots.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

## ELECTIONS

### Qualifications of Electors—Louisiana

Act No. 613 of the 1960 session of the Louisiana legislature is a joint resolution proposing an amendment to the state constitution setting up additional criteria for refusing registration for voting. These include: conviction for a felony as well as certain other crimes, participation in a "common law" marriage, and bearing or fathering an illegitimate child. The amendment was approved in the November, 1960 election. The vote was 287,443 for, 152,780 against.

A JOINT RESOLUTION, proposing an amendment to Section 1 of Article VIII of the Constitution of Louisiana by amending Paragraphs (c) and (d) thereof, and by adding thereto new Paragraphs to be designated as Paragraphs (f) and (g), all relative to the right to vote, qualifications and registration of electors, judicial contest of character.

**Section 1.** Be it resolved by the Legislature of Louisiana, two-thirds of the members elected to each house concurring, that there shall be submitted to the electors of the State of Louisiana for their approval or rejection, in the manner provided by law, a proposition to amend Section 1 of Article VII of the Constitution of Louisiana

by amending Paragraphs (c) and (d) thereof, and by adding thereto new Paragraphs to be designated as Paragraphs (f) and (g), so that the same may be made to read as follows:

§ 1. Right to vote; qualifications of electors; registration.

Section 1. Right to vote. After January 1, 1922, the right to vote in Louisiana shall not exist except under the provisions of this Constitution.

Citizenship and age. Every citizen of this state and of the United States, native born or naturalized, not less than twenty-one years of age, and possessing the following qualifications, shall be an elector, and shall



be entitled to vote at any election in the state by the people.

(c) Character and Literacy. He shall be of good character and shall understand the duties and obligations of citizenship under a republican form of government. One who has committed any of the following acts shall not be considered of good character:

(1) Has been convicted of a felony and has not received a pardon and full restoration of franchise.

(2) Has been convicted and sentenced to a term of ninety (90) days or more in jail for each conviction of more than one misdemeanor, other than traffic and/or game law violations, within the five years immediately prior to the date of making application for registration as an elector.

(3) Has been convicted and sentenced to a term of six (6) months or more in jail for any misdemeanor, other than traffic and/or game law violations within one year immediately prior to the date of making application for registration as an elector.

(4) Who has lived with another in "common law" marriage within five years from the date of making application to become an elector, the common law union to be considered in accordance with the definition thereof prescribed by the criminal laws of this state.

(5) Has given birth to an illegitimate child within the five years immediately prior to the date of making application for registration as an elector, provided that the provisions in this paragraph shall not apply to mothers of illegitimate children conceived as a consequence of rape or forced carnal knowledge.

(6) Has been proven to be or who has acknowledged himself to be the father of an illegitimate child within the five years immediately prior to the date of making application for registration as an elector.

(7) The above enumerated acts denoting bad character shall not be deemed exclusive hereunder but said bad character may be established by any competent evidence.

He shall be able to read and write in the English language, or his mother tongue, and shall demonstrate his ability to do so when he applies for registration by the reading and the writing from dictation given

by the registrar, or an interpreter duly sworn, any portion of the preamble to the Constitution of the United States of America, and by making, under oath administered by the registration officer or his deputy, written application for registration, in the English language, or his mother tongue, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the registration officer or his deputy, without assistance or supervision from any person or any memorandum whatever, other than the form of application hereinafter set forth; provided, however, that, if the applicant be unable to write his application in the English language, he shall have the right, if he so demands, to write the same in his mother tongue from the dictation of an interpreter; and, if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon his oath of such disability.

Until and unless otherwise provided by law, the application for registration above provided for, shall be a copy of the following form, with the proper names, dates and numbers substituted for the blanks appearing therein, to-wit:

I am a citizen of the State of Louisiana. My name is Mr. \_\_\_\_\_, Mrs. \_\_\_\_\_, Miss \_\_\_\_\_, I was born in the State (or country) of \_\_\_\_\_, Parish (or county) of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_ I am now \_\_\_\_\_ years, \_\_\_\_\_ months and \_\_\_\_\_ days of age. I have resided in this State since \_\_\_\_\_, in this parish since \_\_\_\_\_, and in precinct No. \_\_\_\_\_, in Ward No. \_\_\_\_\_, of this parish continuously since \_\_\_\_\_, and I am not disfranchised by any provision of the Constitution of this State.

The application for registration form above provided for shall be filled out by the applicant and sworn and subscribed to

before the registrar of voters or deputy registrar of voters.

(d) Character and Understanding. He shall be a person of good character and reputation, attached to the principles of the Constitution of the United States and of the State of Louisiana, and shall be able to understand and give a reasonable interpretation of any section of either Constitution when read to him by the registrar, and he must be well disposed to the good order and happiness of the State of Louisiana and of the United States and must understand the duties and obligations of citizenship under a republican form of government. He shall demonstrate that he is well disposed to the good order and happiness of the State of Louisiana by executing an affidavit affirming that he will faithfully and fully abide by all of the laws of the State of Louisiana.

(f) Notwithstanding any provision in this section to the contrary, the inability of any person to read or write for any reason, who is registered to vote as of November 8, 1960, shall not be grounds for removal of such person from the registration rolls, by the registrar, by challenge of other persons, or by any action of court.

**Section 2.** This proposed amendment shall be

submitted to the electors of the State of Louisiana at the next election for Representatives in Congress, to be held in Louisiana on the first Tuesday next following the first Monday of November, 1960.

**Section 3.** On the official ballot to be used at said election there shall be printed:

FOR the proposed amendment to Section 1 of Article VIII of the Louisiana Constitution, amending Paragraphs (c) and (d) thereof, and by adding thereto new Paragraphs to be designated as Paragraphs (f) and (g), all relative to the right to vote, qualifications and registration of electors, judicial contest of character, and removal of certain voters from the registration rolls.

and also:

AGAINST the proposed amendment to Section 1 of Article VIII of the Louisiana Constitution, amending Paragraphs (c) and (d) thereof, and by adding thereto new Paragraphs to be designated as Paragraphs (f) and (g), all relative to the right to vote, qualifications and registration of electors, judicial contest of character, and removal of certain voters from the registration rolls.

Each elector voting on said proposition for so amending the Constitution shall indicate his vote relative thereto in the manner provided by the General Election Laws of the State of Louisiana.

## ELECTIONS

### Registrars—Louisiana

**Act 82 of the 1960 session of the Louisiana legislature, approved by the governor on June 22, 1960, makes it a crime to interfere with, coerce, or influence a registrar of voters. The Act applies specifically to elected and appointed public officials as well as private citizens.**

**AN ACT** to amend Chapter 1, Part 1 of Title 18 of the Louisiana Revised Statutes of 1950 by adding Section 13 to prohibit interference, coercion, or influence of any nature upon the registrar of voters by any private citizen or public officials, elected or appointed, and to provide a penalty therefor.

*Be it enacted by the Legislature of the State of Louisiana:*

**Section 1.** Chapter 1, Part 1 of Title 18 of the Louisiana Revised Statutes of 1950 is hereby amended to read as follows:

**Section 13.** Prohibiting interference, co-

ercion or influence upon Registrar of Voters

A. No person or persons, private individuals or public officials, whether elected or appointed, shall in any manner interfere with, coerce or influence a Registrar of Voters where such interference, coercion or influence causes or attempts to cause said registrar to fail to comply with or apply all laws of the State of Louisiana relative to the registration of voters or to elections.

B. The act of interference, coercion or in-

fluencing a Registrar of Voters as set forth in Paragraph A, shall be punishable by a fine of \$1,000 or imprisonment for one year, or both.

**Section 2.** Due to the nature of this legislation and the conditions existing in the State of Louisiana, this Act is declared an emergency and becomes effective immediately upon passage by the Legislature and signature of the Governor of the State of Louisiana.

## ELECTIONS

### Registrars—Louisiana

Act No. 484 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, makes the attorney general, and other attorneys whom he may designate, the official legal advisers for the registrar of voters in each parish.

AN ACT to amend Title 18 of the Louisiana Revised Statutes of 1950 to add thereto a new section to be designated as Section 12.1 to provide that the Attorney General and such other attorneys as he may designate or authorize shall be the attorney and legal adviser for the Registrar of Voters of each parish within their respective judicial districts.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 12.1 of Title 18 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

"Section 12.1 The Attorney General shall be the attorney and legal adviser for the

Registrar of Voters, and he may designate the District Attorney to represent the Registrar of Voters, or authorize the Registrar of Voters to employ special counsel and fix his compensation which shall be paid by the Parish."

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 3.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27, Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## ELECTIONS

### Registrars—Louisiana

Act No. 485 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, requires that all registrars of voters comply "faithfully and without reservation of conscience or mind" with all Louisiana laws relative to registration of voters and to elections.

AN ACT to amend Chapter 1, Part 1 of Title 18 of the Louisiana Revised Statutes of 1950 by adding Section 12 for the purpose of requiring the Registrar of Voters to comply with the Registration of Voters and Election Laws of the State of Louisiana, and to provide a penalty for failure to do so.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Chapter 1, Part 1 of Title 18 of the Louisiana Revised Statutes of 1950 is hereby amended to read as follows:

Section 12. Requiring the Registrar of Voters to comply with the Laws of the State of Louisiana

A. Each Registrar of Voters of the State of Louisiana shall comply with and apply

all laws of the State of Louisiana relative to the registration of voters and to elections, faithfully and without reservation of conscience or mind.

B. Any Registrar of Voters who fails to comply with and apply all laws of the State of Louisiana relative to the registration of voters and to elections, shall be guilty of a misdemeanor and shall be fined, upon conviction, not less than \$100.00, nor more than \$500.00, or imprisoned for not less than thirty days, nor more than six months, or both.

**Section 2.** Due to the nature of this legislation and the conditions existing in the State of Louisiana, this Act is declared an emergency and becomes effective immediately upon passage by the legislature and signature of the Governor of the State of Louisiana.

## ELECTIONS

### Registration—Louisiana

Act No. 305 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, specifies the form to be used for voter registration applications. The form includes statements as to whether the prospective registrant has a criminal record, has entered into a common law marriage, and has had illegitimate children.

AN ACT to amend and re-enact Section 32 of Title 18 of the Louisiana Revised Statutes of 1950, relative to the form to be used by voters for application for registration and the use thereof.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 32 of Title 18 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 32. Application for registration; form

The form to be used for application for registration shall be a copy of the following:

"I am a citizen of the United States and of the State of Louisiana. My name is Mr.

....., Mrs. ...., Miss .....

I was born in the state (or country) of .....

..... Parish (or county) of .....

on the ..... day of ....., in the year

..... I am now ..... years, ..... months, and ..... days of age. I have resided in this state since ....., in this parish since ....., and in Precinct No. ...., in Ward No. .... of this parish continuously since ..... I am not disfranchised by any provisions of the constitution of this state. The name of the householder at my present address is ..... My occupation is ..... My color is ..... My sex is ..... I am not now registered as a voter in any other ward or precinct of this state, except ..... My last registration was in Ward ....., Precinct ....., Parish ....., I am now affiliated with the ..... Party.

In each of the following items the applicant shall mark through the word "have" or the words "have not" so that each item will show a true statement about the applicant:



I have (have not) been convicted of a felony without receiving a full pardon and restoration of franchise.

I have (have not) been convicted of more than one misdemeanor and sentenced to a term of ninety (90) days or more in jail for each such conviction, other than traffic and/or game law violations, within five years before the date of making this application for registration as an elector.

I have (have not) been convicted of any misdemeanor and sentenced to a term of six (6) months or more in jail, other than traffic and/or game law violations, within one year before the date of making this application for registration as an elector.

I have (have not) lived with another in "common law" marriage within five years before the date of making this application for registration as an elector.

I have (have not) given birth to an illegitimate child within five years before the date of making this application for registration as an elector (The provisions hereof shall not apply to the birth of any illegitimate child conceived as a consequence of rape or forced carnal knowledge).

I have (have not) acknowledged myself to be the father of an illegitimate child

within five years before the date of making this application for registration as an elector.

.....  
Signature

Sworn to and subscribed before me:

.....  
(Deputy) Registrar

The application form shall also be provided with an additional space in a form convenient for the notation thereon of:

- (1) Changes of address of the applicant within the Parish,
- (2) Changes of name of the applicant, and
- (3) Remarks.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 3.** This Act shall take effect and become operative if, as and when the proposed amendment to Article VIII of the Constitution of Louisiana, incorporated into House Bill No. 355, introduced at this session is finally adopted at the General Election in November, 1960.

**Section 4.** The Governor having certified to the Legislature during the session of the Legislature the necessity for the immediate passage of this Act, this Act shall become effective immediately upon the approval thereof by the Governor.

## ELECTIONS

### Voting Records—Georgia

**Act No. 652** of the 1960 session of the Georgia legislature, approved by the governor on March 17, 1960, amends that state's voting law to require that the applications of persons who are refused registration be kept at least 30 days. See 3 Race Rel. L. Rep. 345 for the complete Act.

AN ACT to amend an Act effecting a complete revision of the laws of this State relating to the qualifications and registration of voters, approved March 25, 1958 (Ga. L. 1958, p. 269), as amended by an Act approved February 17, 1959 (Ga. L. 1959, p. 57) and an Act approved March 10, 1959 (Ga. L. 1959, p. 182), so as to provide for the disposition

of applications and records; to repeal conflicting laws; and for other purposes.

*Be it enacted by the General Assembly of Georgia*

**Section 1.** An Act effecting a complete revision of the laws of this State relating to qualifications and registration of voters, approved

March 25, 1958 (Ga. L. 1958, p. 269), as amended by an Act approved February 17, 1959 (Ga. L. 1959, p. 57) and an Act approved March 10, 1959 (Ga. L. 1959, p. 182), is hereby amended by adding a new section, to be known as section 16A, to read as follows:

"Section 16A. In the event an applicant is refused registration by the Board as provided in this Act, the application of such

person and other material and records relative thereto shall be stored with other records of the Board or disposed of in such manner as the Board may direct. Provided, however that such application shall be retained at least 30 days from the date of refusal."

**Section 2.** All laws or parts of laws in conflict with this Act are hereby repealed.

## EMPLOYMENT

### Non-Discrimination—New York

Chapter 978 of the 1960 Acts of the New York Senate and Assembly, approved by the governor April 25, 1960, amends that state's Fair Employment Act to permit the attorney general to take proof under Section 406 of the New York Civil Practice Act. This section sets up the procedure for subpoenas and subpoenas *duces tecum*, default judgments, etc.\*

AN ACT to amend the executive law, in relation to the power of the attorney general to take proof of unlawful discriminatory practices

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

**Section 1.** Section two hundred ninety-seven of the executive law, as amended by chapter two hundred eighty-five of the laws of nineteen hundred fifty-two, is hereby amended to read as follows:

§ 297. Procedure. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-

at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice

same manner as prescribed for the service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a subpoena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith,

- \* § 406. Subpoena issued by judge, arbitrator, referee or other persons, in certain cases. 1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the

complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The industrial commissioner or attorney-general may, in like manner, make, sign and file such complaint. *In connection with the filing of such complaint, the attorney-general is authorized to take proof in the manner provided in section four hundred six of the civil practice act.* Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such commissioner shall determine after such investigation that probable cause exists

or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action. (Code §§ 854-858.)

§ 406-a. Witnesses without the state. Whenever the attendance at an investigation or hearing before the legislature, or any legislative committee, or any commissioner appointed by the governor under the public officers law, of a witness, being a citizen of the state of New York or domiciled therein, who is beyond the jurisdiction of the state, is desired by the attorney-general or any assistant or district attorney acting under him or by the speaker of the assembly, the temporary president of the senate or the chairman of any legislative committee or by any such commissioner, the supreme court of the county in which said investigation or hearing is being held, or any justice thereof, may, upon proper showing, order that a subpoena issue commanding such witness to appear before the legislature, the legislative committee or the commissioner, as the case may be, at a time and place therein designated. Such subpoena shall be served by delivering a copy thereof, together with a copy of said order, upon the witness in person wherever he may be sojourning, and tendering the witness necessary traveling expenses from the place of service to the place of the hearing. If the witness so served shall neglect or refuse to appear as in such subpoena directed, the court out of which it shall

for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors. In case of failure so to eliminate such practice, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before three members of the commission, sitting as the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. The case in support of the complaint shall be presented before the commission by one of its at-

issue shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated, to show cause why he should not be adjudged guilty of contempt and be punished accordingly. Upon issuing such order, the court may direct as a part of such order, that the property of the recusant witness at any place within the state shall be levied upon and seized by any sheriff, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted. Such order shall be served by delivering a copy thereof to the recusant witness personally wherever he may be sojourning. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and, if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding one hundred thousand dollars and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon. In case said order to show cause cannot conveniently be served upon the recusant witness personally, the court or justice issuing said order may direct that service thereof be made by publication in the same manner as provided in the civil practice act for the service of a summons by publication, and upon proof of such publication having been made, the same proceeding shall be had and with the same effect as hereinabove provided where personal service of said order to show cause has been effected. (Added L. 1928, ch. 643, March 27.)

torneys or agents, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberation of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice

and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, or the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, as, in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaints as to such respondent. A copy of its order shall be delivered in all cases to the industrial commissioner, the attorney-general, and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination.

§ 2. This act shall take effect immediately.

## EMPLOYMENT

### Unlawful Practices, Discrimination—Delaware

Chapter 337 (Amended Senate Bill No. 397), Volume 52, Laws of Delaware, approved July 9, 1960, makes it unlawful for employers, employment agencies, and labor organizations to engage in certain discriminatory practices based on race, creed, color, national origin, or age; for employers and employment agencies, in connection with prospective employment, to express discrimination unless based on a bona fide occupational qualification; for employers, employment agencies, and labor organizations to take adverse action against persons because of their opposition to practices forbidden in this Act or participation in proceedings respecting matters prohibited in the Act; and for anyone to aid, incite, or coerce the doing of practices forbidden in the Act. A Division Against Discrimination in the state labor commission is created and given rule-making power to effectuate the Act's purposes, and penalties are provided for its violation.

AN ACT to make unlawful certain discriminatory practices in respect to employment because of the ages of the individuals seeking or being in

employment, creating and conferring jurisdiction upon the "Division Against Discrimination" in the Labor Commission of Delaware,



providing for the practice and procedure to be followed in the enforcement of the Act.

*Be it enacted by the General Assembly of the State of Delaware:*

**Section 1.** It shall be unlawful employment practice or unlawful discrimination, as the case may be,

(a) for an employer or employment agency to refuse to hire, employ or license, or to bar or discharge from employment, any individual because of his race, creed, color or national origin, or because such individual is between 45 and 65 years of age;

(b) for an employer or employment agency to discriminate against any individual in compensation or in the terms, conditions or privileges of employment because of race, creed, color or national origin, or because such individual is between 45 and 65 years of age;

(c) for any employer or employment agency to print, circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination, or unless based on a bona fide occupational qualification;

(d) for any labor organization to exclude or expel from its membership any person or to discriminate in any way against any of its members, employers or employees because of race, creed, color or national origin, or because any such person, member, employer or employee is between the ages of 45 and 65 years;

(e) for any employer, labor organization or employment agency to discharge, expel, penalize

or otherwise discriminate against any person because he has opposed any practice forbidden by this act or because he has filed a complaint, testified or assisted in any proceeding respecting the employment practices and discrimination prohibited under this act;

(f) for any person, whether an employer, employee or not, to aid, abet, incite, compel or coerce the doing of any of the practices forbidden by the act, or to attempt to do so.

**Section 2.** The "Division Against Discrimination" in the Labor Commission of Delaware is hereby created and shall have jurisdiction over the subject of employment practices and discrimination made unlawful by this act, provided, however, that any complaint that there has been a violation of Section 1 of this Act must be filed with the Division Against Discrimination within ninety days after the alleged act of violation. The said division shall make such rules and regulations as may be necessary to effectuate the purposes of this act.

**Section 3.** Nothing contained in this act shall be construed to conflict with the laws relating to child and female labor, nor to prohibit the establishment and maintenance of bona fide occupational qualifications, nor to prevent the termination or change of the employment of any person who is unable to perform his duties, nor to interfere with the operation of the terms or conditions of any bona fide retirement, pension, employee benefit or insurance plan.

**Section 4.** Whoever shall be guilty of this act, shall, for the first offense be fined not more than \$200 and for the second offense, shall be fined not more than \$500, or imprisoned for not more than 90 days, or both.

## HOSPITALS

### Admission—Louisiana

**Act No. 136** of the 1960 session of the Louisiana legislature, approved by the governor on June 28, 1960, provides penalties for misrepresentation by applicants for admission to state hospitals.

**AN ACT** to amend and re-enact Section 7 of Title 46 of the Louisiana Revised Statutes of 1950, relative to fraud or misrepresentation

by applicants for admission to hospitals supported by the State of Louisiana, by providing a criminal penalty in addition to a civil rem-

edy for fraud or misrepresentation by an applicant for admission, or any one acting for the applicant.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 7 of Title 46 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 7. Questionnaire for applicant; fraud or misrepresentation; penalties

Before any person is admitted to any hospital, except in cases of emergency, the board of administrators or the superintendent or director of the hospital shall provide a questionnaire to be answered by all applicants for admission.

If any person is admitted through fraud or misrepresentation on the part of the applicant for admission, or any one acting for

him, the board of administrators or the superintendent or director of the hospital may make appropriate charges for services rendered to the patient, in accordance with charges in other first class hospitals, including physicians' and surgeons' fees. The board of administrators or other administrative head of the hospital may bring suit against the patient for recovery thereof.

Any person who shall obtain, attempt to obtain or aid or abet anyone to obtain admission to a hospital supported by the State of Louisiana by means of any false statement, misrepresentation or other fraudulent device shall be guilty of a misdemeanor and upon conviction shall be fined not more than Five Hundred Dollars, or imprisoned for not more than one year, or both.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

## LITIGATION

### Defense of Officials—Louisiana

Act No. 304 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, requires plaintiffs who sue Louisiana state officials to pay the attorneys fees incurred by such officials in the successful defense of suits brought as a result of performance of the duties of their office. A bond for such payment may be required before trial.

AN ACT to amend Section 261 of Title 42 of the Louisiana Revised Statutes of 1950 by adding thereto a new Sub-section to be designated as Sub-section "D", to provide for attorneys' fees incurred by any public official of the State of Louisiana, its agencies or any of its political subdivisions in the successful defense of lawsuits brought as a result of performance of the duties of his office.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Sub-section "D" of Section 261 of Title 42 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

D. Any party who shall file suit against any duly elected or appointed public official of the State of Louisiana or any of its

agencies or political subdivisions for any matter arising out of the performance of the duties of his office other than matters pertaining to the collection and payment of taxes and those cases where the plaintiff is seeking to compel the defendant to comply with and apply the laws of the State of Louisiana relative to the registration of voters, and who shall be unsuccessful in his demands shall be liable to said public official for all attorneys' fees incurred by said public official in the defense of said lawsuit or lawsuits which said attorneys' fees shall be fixed by the court.

The defendant public official shall have the right by rule to require the plaintiff to furnish bond, as in the case of bond for

costs, to cover such attorney's fees before proceeding with the trial of said cause.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## MARRIAGE

### 'Common Law' Marriage Prohibited—Louisiana

Act No. 73 of the Acts of the 1960 Louisiana legislature, approved by the governor June 22, 1960, makes so-called "common law"—or uncereemonious—marriages illegal and punishable by fine and imprisonment.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new section, to be designated as R.S. 14:79.1, to define the crime of entering into a common law marriage, to provide for prima facie evidence of the commission of such crime, and to provide penalties for commission of such crime.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 79.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 79.1. Entering into a common law marriage

Entering into a common law marriage as herein defined is hereby declared to be a crime. For the purposes of this section a common law marriage is an agreement, either written, oral, or tacitly entered into, between a man and woman to then and there become husband and wife, without a ceremonial marriage solemnized pursuant to a license obtained in accordance with the laws of this state, followed by cohabitation. The living together openly by a man

and woman as man and wife shall be considered as prima facie evidence that a common law marriage has been entered into by them.

Whoever commits the crime of entering into a common law marriage with another shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than one year, or both.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## ORGANIZATIONS

### Membership Lists—Louisiana

Act No. 373 of the 1960 session of the Louisiana legislature, approved by the governor on July 8, 1960, provides that all organizations required by law to file membership lists shall be exempt from such filing during any year in which there is in effect an injunction exempting or relieving any organization in the state from filing those lists.

AN ACT to amend Chapter 5 of Title 12 of the Louisiana Revised Statutes of 1950 by adding thereto a new section to be designated as R.S. 12:410, to provide that every organization required to file membership lists by said chapter 5 shall be exempt and relieved therefrom during any year in which there is in effect any temporary or permanent injunction exempting or relieving any organization otherwise covered by said chapter, from filing same; and repealing conflicting laws.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Chapter 5 of Title 12 of the Louisiana Revised Statutes of 1950 is hereby amended

by adding thereto Section 410, to be designated R. S. 12:410, reading as follows:

Section 410. Every organization which is required to file membership lists under the provisions of this Chapter shall be exempt and relieved from each and every such requirement during any year in which there is in effect any time, any temporary or permanent injunction exempting or relieving any organization, otherwise covered by said chapter, from filing same.

**Section 2.** All laws or parts of laws in conflict herewith are hereby repealed.

## ORGANIZATIONS

### State Sovereignty Commission—Louisiana

Act No. 18 of the 1960 session of the Louisiana Legislature, approved by the governor on June 16, 1960, sets up a "State Sovereignty Commission" in the executive branch of the state government. The commission consists of the governor, lieutenant governor, attorney general, president pro-tem of the senate, speaker of the senate, and eight citizens appointed by the governor. It is charged with the duty "to protect the sovereignty of the State of Louisiana from encroachment thereon by the Federal Government . . ." The commission is given subpoena powers and the right to hold hearings in its sphere of interest.

AN ACT to create the State Sovereignty Commission in the Executive Branch of the Government of the State of Louisiana, to provide for the membership and composition of the Commission, to describe its duties, authority and powers; to provide the method for selection of members of the Commission and their compensation and term of service; to fix penalties for violation of the provisions of this Act and to repeal all laws or parts of laws in conflict herewith.

WHEREAS, the Legislature of the State of Louisiana, acting under the police power of the Sovereign State of Louisiana, and under the rights guaranteed unto it by the Tenth Amendment to the Constitution of the United States of America, finds there is a definite need for legislation creating a State Sovereignty Commission, whose purpose it will be to safeguard those rights from encroachment by any agency of the federal government, or by any other state government, and to preserve those rights neces-



sary for the well-being and safety of its citizens and for the orderly conduct of governmental affairs,

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** There is hereby created in the Executive Branch of the Government of the State of Louisiana a Sovereignty Commission to be known as the "State Sovereignty Commission." The State Sovereignty Commission shall be composed of the following members:

The Governor, the Lieutenant Governor, the Attorney General, The President Pro-Tem of the Senate and the Speaker of the House of Representatives, who shall be ex-officio members; eight (8) citizens who shall be appointed by the Governor, one to be appointed from each of the eight Congressional Districts in the State of Louisiana; the Governor, Lieutenant Governor, Attorney General, President Pro-Tem of the Senate and Speaker of the House of Representatives shall serve from and after the date of the passage of this Act during the remainder of their terms of office, and the eight members appointed by the Governor shall serve during his term of office.

**Section 2.** The membership of the Commission and their successors are clothed with full power and authority conferred by this Act, together with all other powers necessary to accomplish the purposes of this Act.

**Section 3.** Each member of the Commission, other than the Governor, Lieutenant Governor, Attorney General, President Pro-Tem of the Senate and Speaker of the House of Representatives, shall receive a per diem of \$25.00 for each day of service rendered in attending meetings or otherwise in the discharge of his duties hereunder, and, in addition thereto, the payment of hotel, meals, and travel expenses while away from his home for any of the purposes herein, except that the Chairman shall receive a per diem of \$50.00 per day. If any member should use his own automobile in traveling on authorized business of the Commission, he shall be paid ten (10c) cents per mile for each mile travelled.

**Section 4.** The Commission shall meet immediately upon the effective date of this legislation and shall select from its number a Chairman and a Vice-Chairman, who shall have the authority to act in the absence of the Chairman.

Each member of the Commission, including the ex-officio members, shall be entitled to one vote on all matters, provided that there shall be no vote cast by proxy. Seven members of the Commission, including ex-officio members, shall constitute a quorum and no business shall be transacted in the absence thereof. The Commission may employ an executive secretary and fix the salary therefor, both subject to the approval of the Governor, who shall keep a record of the proceedings of the Commission and its receipts and disbursements, provided that such records shall be exempted from the provisions of the Public Records Act, but shall be made available to members of the Commission and members of the Legislature, upon their request in writing, and provided further, that upon the order of the Governor, said records shall be destroyed. Other than as provided above, the Commission may organize itself to transact its authorized business; to make and adopt rules and regulations; to appoint committees of its members; and to employ all necessary and proper personnel not inconsistent with any of the provisions of this Act.

**Section 5.** Vacancies on the Commission during any term shall be filled by the Governor.

**Section 6.** It shall be the duty of the Commission to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Louisiana from encroachment thereon by the Federal Government, or by any branch, department or agency thereof, and to resist by all legal means, the usurpation by any agency of the Federal Government or by any organization of rights and powers reserved to the states by the Constitution of the United States, particularly by Article 3, Section 4, of Article 4, and Amendments 9, 10, and 11 of said Constitution.

**Section 7.** The said Commission is hereby fully authorized and empowered to subpoena and examine witnesses, the said subpoena to bear the signature of the Chairman or Vice-Chairman of the Commission, to require the appearance of any persons and the production of any books, records, papers or documents as evidence, and to order the attendance of any witnesses or the production of any books, records, papers or documents, and in such cases the subpoena shall be directed to the Sheriff of the parish or his deputy of the domicile of the person named in the

subpoena for service on the person or persons named therein. If any person shall wilfully refuse to appear before such Commission, or after appearing refuses to testify as to any pertinent matter under study by the Commission, or to produce any paper or record in obedience to any process issued and served, then the Commission shall have authority to enforce obedience thereto by applying through the Attorney General of Louisiana to any District Court of the State of Louisiana within the jurisdiction of which the Commission inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, and the said District Court shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission and to produce evidence, if so ordered, or there to give testimony touching the matter under investigation or to produce such papers and records as have been subpoenaed by the Commission, and failure to obey any such order of the Court may be punished by the Court as contempt thereof, as provided by law.

**Section 8.** Witnesses at the hearings or inquiries conducted by the Commission may be accompanied by their own counsel, and such witnesses shall have the right to have their counsel cross-examine other witnesses who have testified as to fact or evidence relating to said witnesses. The witness shall be informed at the time he is served with subpoena of the general nature of the investigation, and in a general manner, the nature of the inquiry which will be made of him. The witness shall have the right to offer pertinent rebuttal evidence.

**Section 9.** The Chairman or Vice-Chairman of the Commission is hereby authorized and empowered to administer oaths to witnesses and any witness appearing and testifying before said Commission and who shall wilfully testify falsely to any material fact shall be guilty of perjury and shall be subject to prosecution and punishment therefor, as provided by law.

**Section 10.** No statement made or book, paper or document produced by such witness before the Commission shall be competent evidence in any criminal proceeding against said witness, other than for perjury in delivering his evidence.

**Section 11.** The domicile of the Commission shall be the State Capitol, Baton Rouge, Louisiana, and all records of the Commission shall be kept at the domicile of the Commission. The Commission may hold meetings in such places it may deem advisable to properly carry out its functions.

**Section 12.** The Attorney General of the State of Louisiana shall be the attorney for and the legal representative of the Commission. The Commission may employ additional legal counsel and fix their compensation, by and with the advice, consent and approval of the Attorney General and the Governor. Any such additional counsel must be commissioned as a Special Assistant Attorney General.

**Section 13.** The Commission is authorized and empowered to receive and expend any funds appropriated to it by the Legislature of this State, and/or received by it from any other source, in carrying out the objectives and purposes of this Act.

**Section 14.** The Commission is hereby endowed with full power and authority to do and perform any and all acts and things deemed necessary and proper to carry out the objectives and purposes of this Act.

**Section 15.** The creation of this Commission fixes a policy of the people of the State of Louisiana, and therefore, as a part of this policy, all elective and appointive officers and employees of the State, its agencies, and all political . . . subdivisions thereof, municipal and parochial, the Louisiana State University, the State Board of Education, and all other colleges and institutions of higher learning and all boards and commissions, of any type or nature, operating on public funds, are directed to cooperate with the Commission and shall render such aid and assistance as may be requested of them by the Commission.

**Section 16.** If any section, paragraph, sentence, or clause of this Act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this Act, but such other part shall remain in full force and effect.

**Section 17.** That all laws or parts of laws in conflict herewith are hereby repealed.

## PUBLIC ACCOMMODATIONS

### Busses, Streetcars—Louisiana

Act No. 543 of the 1960 session of the Louisiana legislature, approved by the governor on July 9, 1960, requires the operators of public transit facilities to adopt and enforce regulations for the seating of passengers.

AN ACT to promote the comfort, safety and general welfare of passengers using busses and/or street cars operated by transit companies in this state, by requiring all bus companies, street railways, corporations, firms, partnerships, persons, and associations of persons carrying such passengers for hire to adopt regulations for and to direct in accordance therewith the seating of passengers on such busses and/or street cars, requiring the compliance by passengers with such regulations and directives, and providing penalties for violation of the provisions hereof.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** All bus companies, street railways, corporations, firms, partnerships, persons or associations of persons carrying passengers for hire in busses and/or street cars in this State shall adopt regulations for the seating of passengers on their busses and/or street cars and are herewith required to direct the seating of such passengers in accordance with such regulations.

**Section 2.** Any person entering into or riding on any bus or street car covered by the provisions

of this Act is herewith required to peacefully and without disorder comply with the regulations and directives of the bus company, street railway, corporation, firm, partnership, person or associations of persons, and their agents and employees, operating the bus or street car.

**Section 3.** Any person, associations of persons, or partnership, or the officers, agents or employees of any firm, corporation, street railway or bus company violating the provisions of this Act shall, upon conviction thereof, be fined not more than \$500.00, or imprisoned for not more than sixty days, or both.

**Section 4.** The sections, paragraphs, sentences, clauses and phrases of this Act are severable, and if any phrase, clause, sentence, paragraph or section of this Act shall be declared unconstitutional, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Act, but such shall remain in full force and effect.

**Section 5.** All laws or parts of laws contrary to or inconsistent with the provisions of this Act be and the same are hereby repealed.

## PUBLIC ACCOMMODATIONS

### Definition—New York

Chapter 779 of the 1960 Acts of the New York Legislature, approved by the governor April 25, 1960, amends that state's public accommodation law by specifying places which are subject to the provisions of the law. In the text which follows, matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

AN ACT to amend the executive law, in relation to the definition of the term "place of public accommodation, resort or amusement"

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

**Section 1.** Subdivision nine of section two hundred ninety-two of the executive law, as amended by chapter two hundred eighty-four of the laws of nineteen hundred fifty-two, is hereby amended to read as follows:

9. The term "place of public accommo-

dation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such [term] terms as [it appears in section forty of the civil rights law, and it is intended hereby to limit the procedures and jurisdiction of the commission to such places.]: inns, taverns, road houses, hotels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; retail stores and establishments, dispensaries, clinics, hospitals, bath-houses, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors;

garages, all public conveyances operated on land or water, as well as the stations and terminals thereof. Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course, or other educational facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which is in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

§ 2. This act shall take effect immediately.

## TRESPASS

### Penalties—Louisiana

Act No. 78 of the 1960 Acts of the Louisiana legislature, approved by the governor June 22, 1960, makes it illegal to go in or upon structures, bridges, vehicles, water craft, etc., after having been forbidden to do so by proper authority, specifically including notice by posted signs.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new section, to be designated as R.S. 14:63.3, to prohibit persons from going into or upon or remaining in or upon certain property and places after having been forbidden to do so, and to provide penalties for violations thereof.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 63.3 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 63.3. Entry on or remaining in places after being forbidden

No person shall without authority of laws go into or upon or remain in or upon any structure, water craft or any other movable which belongs to another, including public buildings and structures, ferries and bridges, or any part, portion of area thereof, after having been forbidden to do so, either orally or in writing, including by means of any sign hereinafter described, by any owner, lessee, or custodian of the property or by



any other authorized person. Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions. For the purposes of this Section, the above mentioned sign means a sign or signs posted on or in the structure, water craft or any other movable, including public buildings and structures, ferries and bridges, or part, portion of area thereof at a place or places where such sign or signs may be reasonably expected to be seen.

Whoever violates the provisions of this Section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined

not more than five hundred dollars or imprisoned in the parish jail for not more than six months, or be both fined and imprisoned.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## TRESPASS

### Solicitation—Louisiana

Act No. 79 of the Acts of the 1960 Louisiana legislature, approved by the governor June 22, 1960, makes it a crime to incite, solicit, or urge any person to go into or upon buildings, bridges, vehicles, etc., knowing that that person has been forbidden to go or remain there by the owner or other authorized person.

AN ACT to amend Title 14 of the Louisiana Revised Statutes of 1950 by adding thereto a new section, to be designated as R.S. 14:63.4, to prohibit persons from inciting, soliciting, urging, encouraging, exhorting, instigating or procuring other persons to go or remain in or upon certain property and places, knowing that such other persons have been forbidden to do so; to provide for identification of persons involved in investigations or arrests in connection with such prohibited activities; and to provide penalties for violation.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 63.4 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 63.4 Aiding and abetting others to enter or remain on premises where forbidden

A. No person shall incite, solicit, urge, encourage, exhort, instigate or procure any other person to go into or upon or to remain in or upon any structure, water craft or any other movable which belongs to another, including public buildings and structures, ferries and bridges, or any part, portion or area thereof, knowing that such other person has been forbidden to go or remain there, either orally or in writing, including by means of any sign herein-after described, by the owner, lessee or custodian of the property or by any other authorized person.

Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its

members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

For the purposes of this Section, the above mentioned sign means a sign or signs posted on or in the structure, water craft or any other movable, including public buildings and structures, ferries and bridges, or part, portion or area thereof, at a place or places where such sign or signs may be reasonably expected to be seen.

B. Any law enforcement officer investigating a complaint that the provisions of this Section are being or have been violated or any such officer making any arrest for violation of the provisions of this Section, is hereby vested with authority to require any person involved in such investigation or arrest to identify himself to such officer. Upon demand of such officer, the person involved shall inform the officer of his true name and address.

C. Whoever violates the provisions of

Sub-Section A or Sub-section B above, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned in the parish jail for not more than six months, or be both fined and imprisoned.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

## WELFARE FUNDS

### Aid to Dependent Children—Louisiana

Act No. 251 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, redefines "dependent child" and sets up new criteria for eligibility of such children for state aid. Among other factors is a requirement that the home where such child is living shall not be considered suitable if the parents or other relatives there are living together but are not husband and wife. In no instance shall assistance be granted to any person who is living with his or her mother if the mother has had an illegitimate child after a check has been received from welfare funds.

AN ACT to amend and re-enact Sections 231 and 233 of Title 46 of the Louisiana Revised Statutes of 1950, relative to the definition of "dependent child" and relative to the eligibility of dependent children for assistance under the Aid to Dependent Children Program, and the amount and conditions of such aid.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Sections 231 and 233 of Title 46 of the Louisiana Revised Statutes of 1950 are hereby amended and re-enacted to read as follows:

#### § 231. Definitions

A. "Aid to Dependent children" or "Assistance", as the terms are used in this Sub-part, means money payment with respect to a dependent child or dependent children.

B. "Dependent child", as the term is used in this Sub-part, means a needy child under the age of sixteen or under the age of eighteen if found to be regularly attending school or, if unable to attend school due to the fact that said child is physically or mentally disabled, who has been deprived of parental support or care by reason of death,

continued absence from the home or the physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, niece, great uncle or great aunt in a place of residence maintained by one or more of such relatives as his or their own home, and for the purposes of this Sub-part, all such relatives shall qualify as such whether the relationship was acquired by adoption or birth, and neither divorce nor death shall terminate any such relationship. However, nothing in this Sub-part shall be construed as authorizing any state official agent or representative, in carrying out any of the provisions of this Sub-part, to take charge of any child over the objection of either of the parents of the child, or over the objections of the tutor or other persons having the legal care, custody and control of the child.

§ 233. Eligibility for assistance; amount and conditions of aid

A. Assistance may be granted to any dependent child:

(1) Who is living in a suitable family home meeting the standards of care and health fixed by the laws of this state and by the rules and regulations of the state department of public welfare; provided, however, that a home will not be considered suitable in which the parents or other relatives of the child or children living in the home for whom they are requesting aid are living together and are not husband and wife by virtue of a marriage recognized as valid under the laws of this state; and

(2) Who has resided in the state for one year immediately preceding the application for aid; or who shall have been born within one year immediately preceding the application for aid, if the parent or other near relative (as defined in the Social Security Act) with whom the child is living has resided in the state for one year immediately preceding the birth of said child; or who is awarded

assistance under the term of an agreement with another state.

B. Any child qualified for and receiving assistance pursuant to the provisions of this Sub-part in any parish of this state who moves or is taken to another state shall be eligible to receive assistance from this state while residing in the state to which he has moved or is taken for any time not exceeding one year, if otherwise eligible to receive such assistance under the laws of this state, and if such child is not during said time receiving public assistance under the laws of the state to which he has moved or is taken.

C. The parish department of public welfare shall grant such aid as may be necessary for the support of the child in a suitable home maintained by its parent or parents or by one of its relatives, except that the application shall not be approved by the department of public welfare until the relative with whom the child lives has exhausted whatever remedies the law provides for compulsory support by a parent. However, in cases where undue hardship would result from delays in the legal process, the application may be approved for such limited periods of time as may be necessary.

D. In no instance shall assistance be granted to any person who is living with his or her mother if the mother has had an illegitimate child after a check has been received from the welfare department, unless and until proof satisfactory to the parish board of public welfare has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable home for the child or children.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of the Act which can be given effect without the invalid provisions, items or application and to this end the provisions hereof are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

## WELFARE FUNDS

### Illegitimate Children—Louisiana

Act No. 306 of the 1960 session of the Louisiana legislature, approved by the governor on July 7, 1960, prohibits the allocation of public assistance to any child living with its mother if the mother has had an illegitimate child after receiving public assistance, "until proof is made showing that the mother has ceased illicit relationships and is maintaining a suitable home . . . ." For an interpretation of the scope of this Act, see 5 Race Rel. L. Rep. 906, *infra*.

AN ACT to amend and re-enact Section 233 of Title 46 of the Louisiana Revised Statutes of 1950, relative to public assistance to children, to prohibit public assistance to any child living with its mother who has had an illegitimate child after receiving public assistance, unless, and until proof is made showing that the mother has ceased illicit relationships and is maintaining a suitable home for the child or children.

*Be it enacted by the Legislature of Louisiana:*

**Section 1.** Section 233 of Title 46 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 233. Eligibility for assistance; amount and conditions of aid; exceptional children

A. Assistance shall be granted to the child found to be in necessitous circumstances:

(1) Who has resided in the state for one year immediately preceding application; or

(2) Who was born within one year immediately preceding the application if the parent or other relative with whom the child is living has resided in the state for one year preceding the birth; or

(3) Who is awarded assistance under the terms of an agreement with another state.

B. The parish department of public welfare shall grant such aid as may be necessary for the support of the child in its own home or in the home of one of its relatives in a manner compatible with decency and health, except that the application shall not be approved by the department of public welfare until the relative with whom the child lives has exhausted whatever remedies the law provides for compulsory support by a parent. However, in cases where undue hardship would result from delays in the legal process, the application may be approved for such limited periods of time as may be necessary.

C. In no instance shall assistance be granted to an illegitimate child if the mother of the illegitimate child in question is the mother of two or more older illegitimate children unless it should be determined that the conception and birth of such child was due to extenuating circumstances over which the mother had no control. This provision is not intended to preclude an illegitimate child from receiving assistance if the child is already receiving assistance prior to the effective date of this Act or if the child is the first or second illegitimate child born to the mother of the child in question. Until such time as the immediately foregoing provision is approved for federal participation by the Secretary of the Health, Education and Welfare Department, the provision shall not be effective.

D. Any other provisions of this Section to the contrary notwithstanding, no assistance shall be granted to a child living with its mother, if the mother has had an illegitimate child after receiving assistance from the department of public welfare, unless and until proof satisfactory to the parish board of public welfare has been presented showing that the mother has ceased illicit relationships, and is maintaining a suitable home for the children.

**Section 2.** If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or application and to this end the provisions of this Act are hereby declared severable.

**Section 3.** All laws or parts of laws in conflict herewith are hereby repealed.

**Section 4.** The necessity for the immediate passage of this Act having been certified by the



Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become

effective immediately upon approval by the Governor.

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# ATTORNEYS GENERAL

## CIVIL DISTURBANCES

### "Sit-In" Demonstrations—Massachusetts

The attorney general of Massachusetts has advised municipal and police officials in that state that interference with sympathy picketing for lunch counter sit-ins is "almost invariably illegal and unconstitutional." A press release prepared by the office of the attorney general is reproduced below.

Attorney General Edward J. McCormack, Jr., announced today that because questions have been raised as to the right of students to engage in peaceful picketing in sympathy with the lunch-counter sit-downs in the South, he has advised the local Massachusetts municipal and police officials that they cannot interfere with these student demonstrations.

McCormack said that such interference is almost invariably both illegal and unconstitutional.

A number of complaints have been received by the Attorney General's office from negroes, students and other demonstrators.

"The right to picket", McCormack stated, "is an expression of opinion under the First Amendment which has been held lawful by the United States Supreme Court, provided that the objective of the picketing is lawful.

"So long as the purpose of the picketing is to

inform—including urging people not to buy—but is not coercive, it is constitutional."

The Attorney General also took note that some of the local authorities were seeking to suppress the demonstrators on the basis of ordinances prohibiting distribution of circulars.

"Such ordinances", said McCormack, "have long been rendered obsolete because of Federal and State Supreme Court decisions and can no longer be enforced."

He urged, however, that the picketing groups notify authorities or the police or other officials, who do not know about the picketing, of their intentions in order that they may not seek wrongfully to disperse them.

There have been lunch-counter sit-down sympathy demonstrations thus far in Boston, Cambridge, Springfield, Watertown and New Bedford among other cities.

## EMPLOYMENT

### Labor Unions—Maryland

The city solicitor of Baltimore, Maryland, has ruled that an association of city employees is a "labor organization" as defined by that city's anti-discrimination ordinance (1 Race Rel. L. Rep. 1113), and therefore subject to the provisions of the ordinance.

June 1, 1960

Mr. Philip A. Camponeschi, Executive Secretary  
Equal Employment Opportunity Commission  
Fayette and Gay Streets  
Baltimore 2, Maryland

Dear Mr. Camponeschi:

You have requested our opinion as to whether the Classified Municipal Employees Association (hereinafter referred to as C.M.E.A.) is subject to the provisions of Ordinance No. 379, ap-

proved April 18, 1956, prohibiting discrimination in employment because of race, color, religion, national origin or ancestry by employers, employment agencies, labor organizations, and others.

Ordinance No. 379 creates Article 14A of the Baltimore City Code (1950 Edition) and adds seven new sections. Section 10(b) thereof states that it shall be an unlawful employment practice for a labor organization to follow a policy of denying or limiting, through a quota system or otherwise, membership opportunities to any group or individual because of race, color, religion, national origin or ancestry.

Thus, the crucial question to be determined is whether C.M.E.A. is a "labor organization" as that term is defined in the ordinance. Section 9 of Article 14A states the following:

"The term *labor organization* shall include any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment."

In determining whether C.M.E.A. constitutes a "labor organization," we have examined the by-laws of the organization, and certain statements by it of its accomplishments, both of which you furnished us, as well as the minutes of various meetings of the organization to which we had access.

At one time, by-laws of C.M.E.A. on their face attempted to limit membership on racial grounds. The present by-laws state that any employee paid in full or in part by the Mayor and City Council of Baltimore may be eligible for regular membership, with the right to have one vote at general meetings, provided that an employee's membership application is *unanimously* accepted by all of the members present, representing at least a majority of the membership committee, at a regularly called meeting, and is also accepted by a majority of the members present, representing a quorum of the Board of Governors at its regular meeting. An employee whose application for membership has been rejected by the membership committee is afforded the right of review and acceptance of his application, but the rejection of an application by the membership committee can be reversed only by unanimous vote of the Board of Governors.

Article II, Section 1, of the by-laws states that one of the objectives of C.M.E.A. is " \* \* \* to protect their rights (members of C.M.E.A.) under the Merit System and generally to advance their economic, social recreational and other interests and activities."

Article II, Section 2, of the by-laws states that two of the methods for obtaining the objectives of C.M.E.A. are " \* \* \* by encouraging cooperation between department heads and their employees; and by seeking the enactment of legislation to improve the economic and social welfare of Municipal Employees \* \* \* ."

In the February, 1960, issue of *The Hall Light*, the official publication of C.M.E.A., in response to an editorial appearing in the *Labor Herald*, there was published an article, signed by the president of C.M.E.A., listing a number of "the more important reforms resulting from employee organizations' activities." From the context, it is clear that C.M.E.A. claims its full share of credit for the matters listed, which include automatic increments in pay, holidays, overtime pay, equalization of certain pay scales, liberalization of pension benefits, etc.

Without attempting to comment upon the minutes of every meeting of the C.M.E.A. Council or the C.M.E.A. Board of Governors, we refer to several examples that are helpful in an analysis of the functions and activities of C.M.E.A.

#### *C.M.E.A. Council Meeting March 2, 1959*

It was pointed out at this meeting that the City of Baltimore reimburses City employees when an automobile owned by the employee is used for official city business in the amount of seven cents (7c) per mile. The Council then unanimously passed a resolution that the C.M.E.A. Council petition the Board of Governors to take the necessary steps toward having the per mile allowance increased to ten cents (10c) per mile.

#### *Quarterly Meeting of C.M.E.A. April 6, 1959*

At this meeting, the president announced that the Longevity Committee is making progress. The president further stated that the Committee will continue in its efforts to secure longevity.

#### *C.M.E.A. Council Meeting April 13, 1959*

A resolution was passed at this meeting to the

effect that the C.M.E.A. Council petition the Board of Governors to take steps toward placing the Park Police on a five-day work week and granting them leave time equivalent to the standard holiday allowance of thirteen days per year and vacation in proportion to length of service as enjoyed by other City employees. At this meeting there was also a resolution passed to petition the Board of Governors to take the necessary action toward having the present minimum salary of jail guards increased to equal the minimum salary of the Baltimore City Police.

*C.M.E.A. Special Meeting—  
Board of Governors and Employees'  
Service Relations Committee  
November 20, 1959*

At this meeting a resolution was passed to the effect that two members of the Board and two members of the Employees' Service Relations Committee be selected to look into the status of the 1960 budget, particularly in regard to overall salary increases for City employees. The resolution further provided that this Committee appear before the Board of Estimates and recommend increases for City employees.

*Board of Governors Meeting  
December 14, 1959*

At this meeting it was reported that two members of the Board of Governors and two members of the Employees' Service Relations Committee meet with Mr. Benton (the Budget Director) on November 25, 1959 regarding salary increases, longevity, proposed layoffs and rehiring procedure.

Considering the stated objectives of C.M.E.A. and the methods of accomplishing these objectives, as set forth in the by-laws, as well as the accomplishments for which C.M.E.A. claims some credit, and aforementioned descriptions of activities taking place at various meetings of the C.M.E.A. Council and the C.M.E.A. Board of

Governors, it is our feeling that the C.M.E.A. is a "labor organization," as that term is defined in Ordinance No. 379.

In reaching this result, our reasoning follows this path. By its terms the ordinance defines "labor organization" to include an organization which consists "in whole or in part" of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment. It is true that C.M.E.A. does not engage in collective bargaining in the sense in which that term is understood in private industry. Indeed, in the light of *Mugford, et al, v. Mayor and City Council of Baltimore*, 185 Md. 266 (1945), it seems fairly clear that the City may not engage in collective bargaining with C.M.E.A., or any other organization in the private industry sense, but the definition is in the alternative and includes also organizations dealing with employers concerning grievances, terms or conditions of employment. Clearly, C.M.E.A., while it undoubtedly has functions as a social organization, from the references to the by-laws, minutes and publications set forth above, engages, at least in part, in dealing with the City and City officials and agencies in regard to grievances, terms or conditions of employment, and these dealings are over and above legislative activities. To us the conclusion is inescapable that within the meaning of the ordinance C.M.E.A. is a "labor organization" and, hence, the provisions of the ordinance which prohibit a labor organization from establishing, announcing or following a policy of denying or limiting, through a quota system or otherwise, membership opportunities to any group or individual because of race, color, religion, national origin or ancestry are fully applicable.

Very truly yours,  
HARRISON L. WINTER  
City Solicitor  
JACK L. GROSSMAN  
Assistant City Solicitor



## GOVERNMENTAL FACILITIES

### Golf Courses—California

**The Attorney General of California has notified municipalities in that state that a racial restriction on membership in the Professional Golfers Association precludes all governmental agencies from extending special privileges or opportunities to the association or to individuals as members of the association.**

June 1, 1960

League of California Cities  
Hotel Claremont  
Berkeley 5, California

Gentlemen:

Your cooperation is requested in communicating the following information to your membership:

The Professional Golfers' Association has a racial membership restriction in its constitution. The 14th Amendment to the United States Constitution, as well as our State Constitution, laws and public policy, prohibit "state action" which results in discrimination against citizens because of race, creed, color or national origin.

In view of this, no California governmental subdivision or agency may lawfully extend special privileges or opportunities to the PGA or to individuals based upon membership in such association.

Where employment at a public course is restricted to PGA members, such a restriction is unlawful in that it effectively denies employment opportunities to racial minority citizens.

We understand that some public courses ex-

tend free playing privileges to PGA members. This results in unlawful discrimination since individuals barred by race from PGA membership are automatically denied this special privilege.

Where tournaments are co-sponsored by the PGA at public courses, qualified players, regardless of PGA membership, must be permitted to compete.

The State of California is determined to do all within its power to stop unlawful discrimination. The elimination of the practices referred to will be of great assistance in accomplishing this.

We have attempted to get the PGA voluntarily to remove its restriction. Its refusal to do so requires that California, in compliance with its laws, withdraw all governmental benefits.

Your cooperation will be greatly appreciated.

Very truly yours,

STANLEY MOSK  
Attorney General

By  
FRANKLIN H. WILLIAMS  
Assistant Attorney General

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## WELFARE FUNDS

### Illegitimate Children—Louisiana

**The Commissioner of Public Welfare of Louisiana asked the Attorney General of that state to rule on the scope of Act 306 of the 1960 Legislature which prohibits the use of public assistance funds for children whose mothers have had illegitimate children after receiving public assistance. 5 Race Rel. L. Rep. 901, *supra*. The attorney general's office ruled that the statute operates retrospectively so that any mother who had had an illegitimate child at any time in the past after she had received assistance is affected.**

July 7, 1960

Mrs. Evelyn Parker  
Commissioner of Public Welfare  
P. O. Box 4065  
Baton Rouge 4, Louisiana

Dear Mrs. Parker:

Reference is made to your letter of July 7, 1960, requesting our interpretation of certain portions of Sub-section D of both House Bill 363 and Senate Bill 5, as amended. Particularly you wish to know whether this Sub-section should be applied retroactively, in that the prohibition applies only to those who commence to receive public assistance from the effective date of the Acts, or whether the prohibitions apply to a mother who in the past has received assistance for her children at any time.

Ordinarily Acts of the Legislature are effective prospectively, unless an intent is otherwise expressed, and the whole of these two Acts must be examined to ascertain such intent if possible. It will serve no useful purpose to consider which of these Acts has been or will be considered, the last expression of legislative will, because of the conclusions which we have reached. It may be contended however, that Section C which was contained in the old law, without the Sub-section

letter, and omitted in Senate Bill No. 5, was designed to clarify any conflicting provision which are set forth in Sub-section D of the Senate Bill, which seems clearly to be the case. In House Bill No. 363, Section C remains, whether enforceable or not, but Sub-section D begins with the following words: "Any other provisions of this Section to the contrary . . ." and because of this language, it also seems clear that Sub-section D is intended to stand alone in this House Bill.

From the above, it is our opinion that Sub-section D of the two bills can be interpreted so as not to do violence to any other portions of the two bills. The Sub-section, in part, provides that no assistance shall be granted to a child living with its mother, if the mother *has had* an illegitimate child after receiving assistance from the department, until proof has been made in a certain manner that the mother has *ceased* illicit relationships and is *maintaining* a suitable home. The words "has had" emphasized above, in our opinion, has reference to any time in the past. Therefore it is our opinion that this Sub-section is retroactive in its effect.

Sincerely yours,  
Carroll Buck  
Assistant Attorney General



# ADMINISTRATIVE AGENCIES

## CORPORATIONS Libraries—Virginia

The State Corporation Commission of Virginia has granted a charter for a foundation to provide and operate, on a membership basis, a non-profit library in Danville. The charter grants the corporation power to promulgate "reasonable rules and regulations for the qualification of membership and for the efficient use of such private library facilities." See also 5 Race Rel. L. Rep. 528.

### ARTICLES OF INCORPORATION OF DANVILLE LIBRARY FOUNDATION

This is to certify that we, the undersigned, do associate to establish a non-stock, non-profit making corporation under the provisions of Chapter 2, Title 13.1 of the 1950 Virginia Code, as amended; and that we, by this, the Articles of Incorporation, set out as follows:

1. That the name of the corporation shall be Danville Library Foundation.

2. The purposes of the corporation shall be as follows:

(a) To provide and operate, for its members, a private, non-profit making library, to make available books, periodicals, and other reading material, on either a lend basis or for use within the library building, and to do all things necessary or desirable in and about the operation of a private library; and,

(b) To lease, purchase, or otherwise acquire land and buildings for library purposes, books, periodicals, furniture, and any other property reasonably necessary for the operation of a private library; and,

(c) To promulgate reasonable rules and regulations for the qualification of membership and for the efficient use of such private library facilities.

3. The corporation shall have no membership with voting rights; no part of the property or income of the corporation shall be distributable to any individual, but shall be expended or invested for the purposes of operating said private

library; no dividend of income or liquidating income shall be paid to any individual, and in the event of dissolution, the assets of the corporation shall be liquidated by the Board of Directors as hereinafter provided, and the assets shall be paid over to the United Fund of the City of Danville, to be used for charitable or benevolent purposes; and if the United Fund should not be in existence at the time of the liquidation and distribution of the corporation's assets, then the Board of Directors shall select one or more charitable or benevolent organizations, contributions to which are recognized as tax deductions for income tax purposes by the federal government, which distribution shall be made in such proportions as the Board of Directors, in its sole discretion, may deem proper. The Board of Directors may, upon a majority vote, enact and adopt by-laws for the corporation, and upon a vote of a majority of the directors in office, after the notice required by law, may dissolve the corporation or amend its charter in the manner required by law; provided that such charter amendment does not change the non-profit and benevolent purposes of the corporation.

4. The initial registered office of the corporation shall be: c/o Talbott, Wheatley & Talbott, Masonic Building, Danville, Virginia, and the initial registered agent shall be C. Stuart Wheatley, who is a member of the Virginia Bar, and a resident of Virginia.

5. That the number of initial Directors of the corporation is six and their post office addresses are as follows:



C. Stuart Wheatley	117 Virginia Avenue Danville, Virginia
C. Brook Temple	110 Lady Astor Street Danville, Virginia
A. A. Farley, Sr.	221 Howeland Circle Danville, Virginia
J. E. Speer	263 Hawthorne Drive Danville, Virginia
W. C. Henderson	343 Parkland Drive Danville, Virginia
John W. Carter	333 College Avenue Danville, Virginia

The Board of Directors shall not be less than three, and shall conduct the affairs of the corporation, and shall have a right to increase or decrease the number of directors, from time to time; provided, however, that one-third of the initial Board shall serve for a period of one year; one-third of the initial Board shall serve for two years; and the remaining one-third shall serve for three years, so that the terms of one-third of the Board of Directors shall expire each year, and such directors shall be re-elected or replaced by a vote of the remaining Board members.

6. The duration of the corporation shall be perpetual.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this 25th day of May, 1960.

/s/ Charles E. Carter (Seal)

/s/ John W. Carter (Seal)

/s/ Mary A. Harden (Seal)

STATE OF VIRGINIA

CITY OF DANVILLE, to-wit:

I, Geraldine S. Kuratowski, a Notary Public in and for the City and State aforesaid, do hereby certify that Charles E. Carter, John W. Carter and Mary A. Harden, whose names are signed to the foregoing Articles of Incorporation, bear-

ing date on the 25th day of May, 1960, personally appeared before me in my City and State aforesaid, and acknowledged the same.

Given under my hand this 25th day of May, 1960.

My commission expires April 28, 1964.

/s/ Geraldine S. Kuratowski

Notary Public

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

AT RICHMOND, May 31, 1960

The accompanying articles having been delivered to the State Corporation Commission on behalf of Danville Library Foundation and the Commission having found that the articles comply with the requirements of law and that all required fees have been paid, it is

ORDERED that this CERTIFICATE OF INCORPORATION be issued, and that this order, together with the articles, be admitted to record in the office of the Commission; and that the corporation have the authority conferred on it by law in accordance with the articles, subject to the conditions and restrictions imposed by law.

Upon the completion of such recordation, this order and the articles shall be forwarded for recordation in the office of the clerk of the Corporation Court of the City of Danville.

STATE CORPORATION COMMISSION

/s/ By Jesse W. Dillon, Acting Chairman

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Danville.

The foregoing certificate (including the accompanying articles) has been duly recorded in my office this 10th day of June, 1960 and is now returned to the State Corporation Commission by certified mail.

/s/ T. F. Tucker, Clerk

## EDUCATION

### Public Schools—New York

The New York City Board of Education on August 31, 1960, issued a joint statement by the president of the Board and the superintendent of schools announcing that effective September, 1960, an "open enrollment" program would be instituted whereby all pupils at the entrance level of junior and senior high schools which have a heavy concentration of Negro and Puerto Rican students will be given the opportunity to transfer to certain other schools which are utilized at less than 90 per cent of capacity. The statement noted that schools with heavy minority concentrations are found in all boroughs except Richmond, and that under this program students living in Queens and Brooklyn will be able to transfer within their own borough, and those in Manhattan or the Bronx to appropriate schools in either of those two boroughs. The procedure to be followed was outlined: parents will make requests for transfer on a form supplied by the principals of "sending schools" and will themselves be responsible for the transportation of their children to the "receiving schools," but the final determination of the transfer will be made by the Board's junior and senior high school division officials on the basis of "administrative practicalities." It was also announced that the "open enrollment" program would be in operation at the elementary school level no later than September, 1961. The statement was prefaced by remarks that the blending of racial and religious minority groups into the American way of life has been "the very strength and foundation of our nation"; that each group has benefited from the blending process and has in turn contributed to cultural enrichment and national growth; that the opportunity for minority groups "to join educationally with the rest of our population" through racial integration of schools is "an essential and imperative element of democratic education"; and that the "open enrollment" program is but another among many steps that have been taken in New York City, especially since 1954, "to provide the best possible opportunities for children attending schools in relatively segregated residential areas."

JOINT STATEMENT by Mr. Charles H. Silver, President of the Board of Education, and Dr. John J. Theobald, Superintendent of Schools (2 P.M., Wednesday, August 31, at press conference in office of Superintendent of Schools, Room 1016, Board of Education Headquarters, 110 Livingston Street, Brooklyn, New York).

Although our democratic society cherishes individual differences, the blending of minority groups of all races and creeds into the American way of life has been the very strength and foundation of our nation. This has been a natural consequence of the morality of our American heritage and of our Judaeo-Christian tradition. In the process each group not only has itself benefited from this blending but also has contributed to the enrichment of our culture and the growth of our country.

Assimilation of minority groups has always been a major problem of the United States and particularly of its large cities. Clearly, people cannot be assimilated in isolation. Such isolation not only deprives them of the full benefits of our democracy but in turn deprives our democracy of the full benefits these people can contribute.

We have found over the past several years that the Negro and Puerto Rican population of our City can achieve through education and contribute to our progress far more than has been possible under the present pattern of our social structure. It is logical, therefore, that we provide greater opportunity for them to join educationally with the rest of our population.

#### *[Integration Essential to Democratic Education]*

Such an opportunity, popularly referred to as racial integration in our schools, is an essential and imperative element of democratic education in our City and Nation especially at this juncture in world history. The ever-increasing demand for trained human intelligence imposes an even greater responsibility upon a school system to determine and develop effectively all the potential entrusted to it for this purpose. Moreover, the challenge of a foreign ideology demands the utmost diligence in the development, preservation, and improvement in our democratic processes.

Our school system in New York City is a complex and big one, and the quality of our schools

varies. A school can be a good school regardless of ethnic distribution, but there can be little doubt, in terms of what we hold dear in our nation, that a school has certain additional values for our democracy if its student body represents a variety of ethnic and religious distributions.

This was, substantially, what was expressed by the Board of Education in December, 1954, when the Board created its Commission on Integration to study ways in which greater educational opportunities could be provided for pupils residing in areas with a high concentration of minority groups. However, both the Commission and the Board recognized that the residential patterns in the City are a deterrent to securing heterogeneous school populations, and consequently determined to proceed with sound educational measures on two fronts (1) to continue the improvement of services in schools with minority group concentrations (2) to secure better ethnic distribution in our schools.

#### [Steps Taken]

As a consequence, many steps have been taken, after careful study, to provide the best possible opportunities for children attending schools in relatively segregated residential areas. A report detailing these steps, entitled *Toward Greater Opportunity*, was published this past June. Among them are special programs and procedures to raise the level of academic achievement of the pupils, expansion and improvement of guidance services, the development of a highly successful Higher Horizons program which aims to compensate for cultural limitations of children of all levels of ability, assignment of additional teachers with consequent reduction of class size, increased and improved remedial instruction, improvement of physical school facilities, and others.

In addition to these measures, many pupils in overcrowded schools have been transferred with their parents' consent to under-utilized schools, and in this process some integration was achieved. From 1957 to 1960, almost 30,000 pupils have been shifted for better utilization and, in most cases, improved integration. Moreover, integration has been one of the factors in the selection of sites for new schools and in all new zoning of schools.

The importance of such considerations in the pursuit of excellence in education has been further underscored in the recent statement by the New York State Regents.

All these measures for better education have been the results of close collaboration between the Board of Education, representatives of the several city-wide and borough parent federations and associations, advisory groups on the implementation of the recommendations of the Commission on Integration, and many other civic-educational groups in the City. We have moved along in an orderly fashion.

In the past year and a half we have been studying how, in spite of the fact that schools are generally districted, we can institute a program of open enrollment whereby parents of pupils in schools with a heavy concentration of minority groups can be given the opportunity to transfer their children to schools with unused space and to an educational situation where reasonably varied ethnic distribution exists. The Board of Education is now ready to institute such a program.

#### [The "Open Enrollment" Program]

Effective September, 1960, all pupils at the entrance level of junior and senior high schools which have a heavy concentration of Negro and Puerto Rican students will be given the opportunity to transfer to certain other junior and senior high schools which are utilized less than 90 per cent of capacity. Schools with heavy minority concentrations are found in all boroughs except Richmond. Under this program, students living in Queens and Brooklyn will be able to transfer within their own borough, and those living in Manhattan or The Bronx to appropriate schools in either of these two boroughs.

Parents will make the request for transfer on a form which will be sent them by the principals of schools classified as "sending schools" and will themselves be responsible for the transportation of their children to the "receiving schools". Final determination of the transfer will be made by the junior and senior high school division officials at Board of Education headquarters on the basis of administrative practicalities.

While the program will be implemented immediately at the junior and senior high school levels, the magnitude and complexity of this program at the elementary school level demands additional time to work out the details and organization, in order to implement as effectively as possible the program in this much larger segment of the school system. In any case, the program will be in operation at the elementary school level no later than September, 1961.

Parents offered this opportunity will want to consider carefully its advantages and disadvantages, both of which vary in degree according to each particular situation and for each particular child.

By this additional step, the public schools of New York City accept the responsibility and obligation for educational leadership in this delicate and crucial area of our social structure. In doing so, we seek to make a significant contribution to our city and our nation.

ETHNIC DISTRIBUTION BY  
PERCENTAGE OF SCHOOLS  
1959-1960

JUNIOR HIGH SCHOOLS

School	Negro	Puerto Rican	Others
<b>Manhattan</b>			
13	26.4	70.3	3.3
43	52.9	36.3	10.8
45	30.4	54.6	15.0
88	97.6	1.2	1.2
99	26.0	58.7	15.3
117	28.3	63.4	8.3
120	91.5	8.1	.4
136	98.0	2.0	.....
139	98.1	1.9	.....
164	73.3	11.0	15.7
104	1.0	22.8	76.2
167	5.3	10.1	84.6
<b>Bronx</b>			
40	47.1	44.2	8.7
52	14.1	73.1	12.8
55	50.8	42.7	6.5
120	48.7	46.8	4.5
45	4.6	5.4	90.0
82	3.1	2.2	94.7
101	6.0	4.0	90.0
113	20.0	4.0	76.0
115	3.6	2.8	93.6
127	.3	1.4	98.3
143	3.5	.6	95.9
<b>Brooklyn</b>			
33	42.7	47.4	9.9
35	95.6	3.6	.8
57	63.6	23.6	12.8
178	58.7	24.3	17.0
258	95.1	4.2	.7
10	.9	9.0	90.1
62	.4	.4	99.2
96	.7	.5	98.8
126	12.6	10.4	77.0
220	.3	1.0	98.7
223	.2	.7	99.1
227	.2	.8	99.0
228	.3	.1	99.6
232	1.5	.3	98.2
259	.8	.2	99.0

Queens

40	95.6	3.1	1.3
142	77.5	2.5	20.0
73	.3	1.1	98.6
126	10.9	6.8	82.3
141	.3	1.1	98.6
158	5.5	.3	94.2
172	.1	.4	99.5
190	.1	.1	99.8
198	5.9	1.3	92.8
204	16.0	8.2	75.8
217	2.8	2.6	94.6

SENIOR HIGH SCHOOLS

Schools	Negro and Puerto Rican	Others
Girls High School	88.0	12.0
Franklin Lane H.S.	23.0	77.0

\*SPACE AVAILABLE AT  
JUNIOR HIGH SCHOOL  
"RECEIVING SCHOOLS."

Borough	School	Space
<b>Manhattan</b>	JHS 104	96
	167	132
	Total Space Available—228	
<b>Bronx</b>	JHS 45	93
	82	36
	101	117
	113	193
	115	52
	127	96
	143	121
	Total Space Available—708	
<b>Brooklyn</b>	JHS 10	110
	62	55
	96	158
	126	29
	220	113
	223	254
	227	172
	228	104
	232	162
	259	43
	Total Space Available—1,200	

Figures determined by taking approximately 40% of underutilized available classroom space. Because the program of open enrollment is expected to be a continuing one and because a pupil transferring to a "receiving school" is expected, if possible, to remain in that school for three years, all of the available space at a "receiving school" cannot be used during this first year. Space must be left available for the succeeding years.

Borough	School	Space
<b>Queens</b>	JHS 73	79
	126	202
	141	141
	158	80
	172	67
	190	104
	198	78
	204	104
	217	75
	Total Space Available—930	

Space available this year for implementing open-enrollment program Junior High School City-Wide total—3,066



## EMPLOYMENT

### Fair Employment Laws—Michigan

**Jerrie LaVerne JIMMERSON, Claimant v. SAVOY THEATER, Respondent.**

Michigan Fair Employment Practices Commission, August 17, 1960, Claim No. 1068.

**SUMMARY:** A Negro girl filed a complaint with the Michigan Fair Employment Practices Commission (FEPC) against a motion picture theater which refused to employ her. A hearing commissioner determined that respondent had committed at least three acts of racial discrimination against claimant, in violation of the state fair employment act: (1) refusing to consider her for the position of candy counter operator after she had applied therefor in response to an advertisement, falsely telling her that the job had been filled, and employing a white applicant thereafter; (2) on a later occasion refusing to hire her by subjecting her to investigations and tests not applied to white applicants; (3) on a final occasion, after having promised her employment cleaning and picking up paper at less pay than the job for which she had applied, refusing to hire her in any capacity because of FEPC intervention in her behalf. Pursuant to the hearing commissioner's recommendations, the FEPC ordered the theater to cease and desist from discriminating against claimant and other applicants for employment because of race, religion, or nationality; to offer immediately the claimant the position of candy counter girl at the prevailing wage presently paid by the theater; to pay the claimant a month's wages and benefits for a period of unemployment after the refusal to hire; and to submit to the FEPC by a specified date written reports of compliance with the order. The hearing commissioner's finding of fact opinion, conclusions of law, and recommendations and the commission's order follow.

#### FINDING OF FACT

1. On January 11, 1960, in response to an advertisement which appeared in the Grand Rapids Press, the claimant went to the box office of the Savoy Theater. She was informed by the cashier that the position had been filled. Later the same day, the claimant telephoned the theater inquiring about the availability of the job and was informed that the position was still open. An applicant was hired the next day, January 12.

2. On February 10, 1960, a Conciliation Conference was held at the Morton House in Grand Rapids. Mr. W. E. Goodrich, Owner-Manager, met with Mr. Hodges and Mr. Layton. Meanwhile, the same position as counter-girl had again become vacant. As a possible adjustment, Mr. Goodrich agreed to interview the claimant and consider her application. On Saturday, February 13 Mr. Goodrich met the claimant, hired her and told her to report for work on Monday, February 15. When she reported for work on the agreed date, Mr. Goodrich told her that she would not be hired because South High School refused to recommend her because of her attendance record.

3. The claim was re-opened at the March Commission meeting. A new Conciliation meet-

ing took place on April 8, 1960 between Mr. Goodrich and Messrs. Kelley and Layton representing the Commission. Mr. Goodrich agreed with great reluctance to give the claimant a job which the Commission representatives understood as "essentially the same as the job advertised in the paper for which the claimant originally applied." It was agreed that Mr. Layton would instruct the claimant to report to the theater office on Monday, April 11 at 11 A.M. When the claimant reported to the respondent's office, she was offered a position that permitted only 10 hours of work per week at 60¢ an hour. The original position pays 85¢ an hour for a 40 hour week. Moreover, the so-called "usherette" job was essentially a menial job of cleaning and picking up paper that would entail no work at the concession stand.

4. In spite of the obviously inferior position, the claimant agreed to "try the job out." She was informed by Commissioner Zaun, thru a letter sent by Mr. Hodges on April 13, that "although you may accept Mr. Goodrich's offer, if you so choose, you are under no obligation to do so." In the judgment of Commissioner Zaun "this job offer is totally inadequate and unacceptable. It in no way compares with the candy counter position which you originally sought and which Mr. Goodrich promised the Commission that he

would give you." The letter went on to say that "at the Commission's monthly meeting (April 13, 1960) Commissioner Zaun moved and the Commission adopted his motion to process this matter to Public Hearing unless Mr. Goodrich offers you immediate employment as a candy counter girl." A copy of this letter was sent to Mr. Goodrich on April 13.

5. The claimant had been told to report for work on the inferior job on Friday, April 15. That morning Mrs. Goodrich, wife of the respondent, went to the home of the claimant to tell her not to go to the theater because she would not be hired in any capacity.

### OPINION

This series of events includes several violations of the Michigan State Fair Employment Act. They all have their origin in the defendant's fear of being the first to break the pattern of discrimination in Grand Rapids Theaters. He knows of no theater which employs Negro counter girls and he feels very strongly that the Savoy Theater could not afford to be the first to do so, since the concession stand business often spells the difference between a profit and a deficit operation. (Question 1, 4 Page 178). His reluctance to hire Miss Jimmerson was based upon this opinion (Question 1, page 179). Although both Mr. Goodrich and Miss Ancona both state that he never gave orders to reject Negro applicants per se, Miss Ancona doubtless knew his attitude and acted accordingly. Hence, the claimant was told that the job had been filled when it was still open on January 11. Although Miss Ancona does not recall rejecting the claimant, we have the following strange testimony (page 167): "Q. Miss Jimmerson testified that on January 11th she was told at the box office of the theater that the position had been filled; do you recall saying that to her? A. Not to her directly; we had quite a few applicants. Q. Do you recall saying it to any colored girl? A. We had quite a few there. Q. So you could possibly have said that? A. Yes. Q. She also testified that later that afternoon she phoned the box office and was told that the job was still open; would you think that that testimony is true? A. It may have been." Now in answer to the next question she claims that she personally does not recall doing this at any time. In view of the somewhat evasive answers of the witness and of her obvious loyalty to Mr. Goodrich, the above testi-

mony seems to constitute a reluctant admission that the events upon which the original claim was based actually took place.

### [The First Violation]

We must bear in mind that at the time Miss Jimmerson applied, Mr. Goodrich testifies "I needed someone quite bad." (answer to question 4, page 173). Hence he hired Patricia Bowman although she was under 18 and "I didn't think the girl would stay too long, and she didn't" (top of page 173). So in spite of the fact that a girl was badly needed and one was hired the next day who had neither the age requirement nor the appearance of stability, Miss Jimmerson was not even referred to the owner but was summarily rejected by a false statement that the job had been filled. In view of the defendant's own statements regarding his reluctance to hire a Negro, we conclude that the applicant was rejected for interview and consideration by reason of her race. In such a situation, had the claimant been white, there is little doubt that she would have obtained the job. This constitutes the first violation of the Fair Employment Practices Act.

On February 15 the defendant refused to give a promised job to the claimant on the grounds of a poor recommendation from the principal of South High School, Grand Rapids. The Public Hearing brought out the following facts: 1) "She was a good worker *when she was here.*" 2) "but she was undependable as to her attendance. She was often absent without notice." (Both statements from letter signed by Mr. Sherman Coryell, Principal). 3) The letter concludes "We can not recommend her from her attendance record." 4) These statements refer to absences not from school but from a volunteer help program in which the claimant had promised to participate. Volunteers were given no salary nor was any record kept of their absences. The non-recommendation was based upon the memory of Mr. Coryell and two aids with whom he consulted before issuing the letter. Just how often the claimant was absent from the volunteer program while actually in the school is anybody's guess. Mr. Coryell when asked how many times she was absent from the volunteer work, answered "I could not pinpoint that but it was enough to be noticeable" (page 78).

### [The Second Violation]

The most salient fact about the attendance

record is that the defendant went out of his way to get one *only* in the case of the Negro applicant. He made a personal visit to the school. He hired the successful applicant, Miss Bowman, first and says that he was going to check her record later. He hired another applicant for the job, Miss O'Grady, without checking her high school record. (page 187) When asked "Checking high school attendance records is quite an unusual thing, isn't it, for you?" Mr. Goodrich answered "Yes" (page 187). When asked if he checked records frequently, Mr. Goodrich replied, "No, but I didn't have people—I didn't have the State of Michigan bother me about hiring the help either (page 188). The weight of evidence is preponderately in favor of this conclusion: the respondent was determined not to hire a Negro out of fear of financial harm. He went out to South High School seeking a plausible excuse for not hiring the claimant. In doing so he subjected her to investigations and tests not applied to any of the other applicants. The fact that the school record was unfavorable regarding reliability was fortuitous. He hired the successful applicant, Miss Bowman, despite the fact that "I didn't think the girl would stay too long, and she didn't" (page 173). This application of two tests or measures—one for white applicants and another for Negroes—is a second violation of the Fair Employment Practices Act.

#### *[The Third Violation]*

On April 15, the respondent again refused to hire the claimant even in an inferior position. It is not clear whether at this time the respondent had received the Commission's letter of April 13 or not. At any rate, his wife visited the home of the claimant and told Miss Jimmerson not to come down to the theater because she wouldn't get the job (page 45). When asked to explain why he changed his mind a second time about giving the claimant a job Mr. Goodrich replied: "Well, I did not really offer her a job" (page 188). This is plainly contradicted by his wife's intervention telling her not to come down on the day agreed upon to claim the job. Note, too, that Miss Jimmerson was not even given the opportunity to present herself for the lesser job. Later, Mr. Goodrich testified as follows: "Q. In one of your previous answers when you were asked why you changed your mind about hiring her in the second instance, among other things you said 'I didn't want to hire her in the first place' (page 176)." "A. No, I just tried to get

the Commission off my back" (page 189). "Q. All right, now, you said you changed your mind about hiring her in the second instance because of the intervention of our Commission?" "A. That is right." "Q. Do you realize that that amounts to reprisals against an applicant by reason of having appealed to this Commission and that it is against the letter of the law (Act 251, Sec. 3 (f) that it is illegal to have reprisals against any candidate because they have asked this Commission for help; do you realize that?" "A. No, I didn't realize it. I didn't realize that this Commission even existed." "Q. Well, do you realize it now?" "A. Yes (page 190)." Here we find a third violation of the Act. All three, of course, stem from the same basic motive which is well expressed in the testimony at the bottom of page 188 and the top of page 199: "Q. In other words, you don't want a colored girl to work on the candy counter, is that it?" "A. I wouldn't say that." "Q. Well, do you?" "A. No." "Q. You don't?" "A. No."

#### CONCLUSIONS OF LAW

1. That the Motion to Dismiss by Respondent is without merit and should be dismissed.
2. That the respondent, Savoy Theater of Grand Rapids, owned and operated by William Emmett Goodrich in partnership with the estate of William Murray, discriminated against Jerrie LaVerne Jimmerson because of her race.
3. There were at least three acts of discrimination in violation of Act 251 of the Public Acts of 1955, known as the Michigan Fair Employment Act.
4. The first act of discrimination occurred on January 11, 1960. On that date, the respondent, not personally, but through his agent, Theresa Ancona, who had been authorized to screen and hire applicants for a position as candy counter operator (hire at least on a provisional basis) refused to consider the application of Miss Jimmerson and falsely told her that the job had been filled.
5. The second act in violation of the law occurred on February 15, 1960. On that date, the respondent himself refused to hire Miss Jimmerson by subjecting her to investigations and tests not applied to any of the other applicants for the position.
6. The third act in violation of the law occurred on April 15 when the defendant through his wife refused to hire Miss Jimmerson in any capacity at the Savoy Theater.

7. All these acts were motivated by the Respondent's unwillingness to hire a Negro as candy counter operator in his theater because of his fear that he would suffer loss of patronage and financial loss. Whether this fear is well founded is a highly debatable point and has no direct bearing on compliance with the law.

#### RECOMMENDATIONS OF THE HEARING COMMISSIONER

1. That the respondent should immediately hire the claimant as candy counter girl, the position originally denied her. This is contingent upon Miss Jimmerson's being willing to accept the position.

2. That the respondent pay the claimant such wages, benefits and other compensation to which she would have been entitled from April 15, 1960, the day on which the respondent was ordered by the Commission to hire the claimant, until May 16, 1960, the date on which she accepted employment at Blodgett Memorial Hospital.

3. That in the event the respondent refuses to comply with the Commission's orders the case be turned over to the proper legal authorities for court action.

/s/ Father John F. Finnegan  
HEARING COMMISSIONER

#### ORDER

In this matter a public hearing having been held in accordance with the Michigan Fair Employment Practices Law and the rules and regulations of the Commission, and the Commissioners having read the transcript of the testimony and considered the record as a whole and having filed Findings of Fact and Conclusions of Law and an Opinion on said matter;

IT IS HEREBY ORDERED that the respondent cease and desist from further discriminating against the claimant, Jerrie Jimmerson, and any other applicants for employment or employees, on the basis of race, religion or nationality.

IT IS FURTHER ORDERED that the respondent immediately offer the claimant the position of candy counter girl at the prevailing wage presently paid by the respondent.

IT IS FURTHER ORDERED that the respondent pay the claimant such wages, benefits and other compensation to which she would have been entitled from April 15, 1960, (the date on which the respondent had agreed to hire her) to May 16, 1960, the date on which the claimant accepted other employment.

IT IS FURTHER ORDERED that the respondent submit to the Commission on or before September 17, 1960 written reports of the manner of compliance with the instant Order.  
August 17, 1960

## EMPLOYMENT

### Fair Employment Laws—Washington

In the Matter of Anita MARKEY and Ralph BLACK, Manager, and MARKETIME DRUGS, Inc.

Washington State Board Against Discrimination, January 25, 1960, Case No. E-575.

**SUMMARY:** A Negro woman filed a complaint with the Washington State Board Against Discrimination, charging a drug store and its manager with unfair hiring practices under the Washington State Law Against Discrimination. 2 Race Rel. L. Rep. 461 (1957). When complainant sought employment at the store, respondent manager refused to give her an application form, saying that there were many applications already on file and no more were being accepted. However, the application of another woman was taken on the same day and she was hired to start work almost immediately. After being refused an application form, complainant telephoned the store and asked if applications were still being accepted. A woman's voice replied that they were, and complainant testified she heard the



manager's voice in the background assenting. Later, she testified, she called and talked to the manager, outlined her experience, and was told to come and fill out an application form, which she did. There was testimony from another manager in the chain that applications were sometimes accepted when no hiring was being done, and sometimes not, and that this could explain the manager's action. At the hearing, the board found the store guilty of discriminatory practices; and a cease and desist order was issued. Complainant had secured work elsewhere meanwhile.

#### FINDINGS OF INVESTIGATOR

December 16, 1959

##### *Complaint*

Mrs. Anita Markey, 1520-24th Avenue North, Seattle, a Negro, charges the Marketime Drugs, Inc., Broadway & Republican, Seattle, and Ralph Black, Manager, with discrimination against her because of her race.

Mrs. Markey states that she inquired by phone on November 9, 1959, as to job applications at the new store that was about to open and she was told to go directly to the store to file for a job in the new location in the Broadway District; that on November 10 she went to the store and talked to Mr. Black, the manager, who told her that he had hundreds of applications already and there was no use leaving an application; that even though she asked him twice for an application blank Mr. Black refused to give her one; that she then went back to her home where she called the store and was told by a woman that they were still taking applications for employment and she should come down and fill out a form; that later the same afternoon she called and talked to Mr. Black, who did not recognize her, and told her to come in and file an application; that she did go back on November 11 and talked to Mr. Black, who gave her an application blank this time; that she filled out the application and left it with Mr. Black who said that he would call her if he could use her.

##### *Reply*

Mr. Ralph Black, Manager of the Broadway Marketime Drugs, and M. C. Jackson, Vice-President of the Marketime Drugs, Inc., Seattle, deny discrimination against Mrs. Anita Markey because of her race.

Mr. Black told the investigator that he had Mrs. Markey's application but as of November 16, 1959, he "hadn't made up his mind about her". He said that he was opening the store on November 18th with experienced help from other stores (there are three other stores in Seattle) and he was going to hire clerks after the opening rush. He said, "I don't know about

how much experience she has had or about her personality and I don't have time to investigate". He expressed some fears about hiring a Negro for this work because: "Suppose I did that and then she can't cut it. If I let her go, wouldn't she file another complaint?"

Mr. Black said that he did not give her an application blank on November 10th because he did not need any more checkers and he already had enough applications.

Mr. C. A. Jackson, Vice-President of Marketime Drugs, Inc. told the investigator that they had all their help hired before Mrs. Markey applied. He said, "We haven't hired anyone since she applied. We take applications all the time whether we need help or not. We can't hire her now (November 20, 1959) because we have no jobs." He pointed out that the store has one Negro in their employ. He is in charge of the central warehouse in the headquarters store at 7101 Empire Way. He has been there less than two years and he has supervision over an all-white crew. He has recommended another Negro man for work in the stockroom at Broadway. (The man whom he recommended was employed to work in the Broadway Marketime since the investigation of this complaint.) Mr. Jackson also said that the store employs one "part-Indian" and at least two Jewish salesmen.

##### *Facts*

Mrs. Anita Markey has worked primarily as a sales girl in drug stores in Chicago for ten years. She has done a variety of jobs during that ten years, including marking, stocking shelves, selling and buying.

She also has worked for a Seattle department store during the Christmas seasons in 1952 and 1957 as a salesgirl.

She has had four years experience in direct selling of books, cosmetics and hosiery.

Mrs. Markey's first attempt to apply for work with the Marketime Drug Store on Broadway in Seattle was on November 10, 1959. Mr. Black, manager, told her that there was no use applying because there were no jobs and he

refused to give her an application blank, even though she asked for one twice.

On November 11, after being assured by someone at the Marketime Drug on the phone that they were still taking applications, she went down again in person and again asked Mr. Black for an application. This time he gave it to her and she filled it out, dating it November 11, 1959, and listing as work that she was applying for both selling and cashier work.

Marketime Drugs have four stores in Seattle. They are a corporation with three men the sole stockholders: John Davis, C. A. Jackson and G. W. Thorpe. Applications are accepted at all times, according to store policy, regardless of whether there is a vacancy to be filled.

Applications for the employees in the Broadway Marketime Drug Store, which opened November 18, 1959, were still being accepted on November 20th.

The four stores employ approximately 80 people. At the time of the investigation of this complaint one of the 80 was a Negro. One additional Negro has been employed since the complaint was investigated. The member of the Negro race who was employed prior to the investigation has been so employed less than two years. He has charge of the warehouse and has supervisory authority over an all-white crew.

Of the sixteen new employees, at least three checkers were employed after Mrs. Markey was refused an application blank on the grounds that no new employees were needed.

Mr. Black, manager of the Broadway Store, told the investigator that he was opening the store with experienced help from other stores and he would not be hiring new help until after the store had its opening.

Mr. Jackson, Vice-President, said that they had not hired anyone since Mrs. Markey applied and they would not be hiring any more help unless someone quits or is fired, in which case they have Mrs. Markey's application and she will be given the same consideration as anyone else. He also said that they take applications all the time, whether they need help or not.

#### *Conclusions*

The investigator finds reasonable cause for believing that a discriminatory practice has been committed against complainant.

Mrs. Markey, in being denied an application blank on November 10th, was not given the same opportunity to compete for employment

as other applicants who were given application blanks before and after November 10th.

If Mr. Jackson's statement of policy that applications are taken all the time whether they need help or not, Mr. Black departed from company policy when he refused to give Mrs. Markey an application on November 10.

Mr. Black's expression to the investigator that "he had not made up his mind yet" and the fear that "if she is hired and terminated she might file another complaint" indicate that the race of the applicant was a factor in the determination not to hire her.

The statement of one of the officers in the corporation that all jobs were filled before Mrs. Markey applied is not borne out by investigation of records.

The investigator believes that the manager and owners of Marketime Drugs, Inc. persist in their refusal to hire Mrs. Markey because of her race and because she has filed a complaint against the corporation.

Glen E. Mansfield, Investigator

#### OPINION OF COMMISSION

A hearing was held in this matter in Seattle, Washington, on January 19th and 20th, 1960 on a complaint filed by Anita Markey with the Washington State Board Against Discrimination, hereinafter referred to as the "Board". At the hearing the Board was represented by Wing C. Luke, an assistant attorney general of the State of Washington. Complainant appeared in person and by her attorney, Fredric C. Tausend. Respondent Ralph Black appeared in person and by his attorneys, Graham, Green & Dunn, through Benjamin J. Gantt, Jr. Respondent Marketime Drugs, Inc., hereinafter referred to as "Marketime", appeared by John Davis, its president, and Mr. C. A. Jackson, its vice president, and by its attorneys, Graham, Green & Dunn, through Benjamin J. Gantt, Jr.

#### *Jurisdiction of the tribunal*

On November 13, 1959 Anita Markey filed her sworn complaint with the Board alleging that these respondents had discriminated against her in employment on account of her race. This complaint was investigated by the Board's staff. On November 23, 1959 Glen Mansfield of the Board's staff made written findings of fact and further found that there was reasonable cause

to believe that a discriminatory practice had been committed against complainant.

Thereafter, on November 25, 1959, this staff investigator prepared a document entitled "Findings of Investigator (Amended)," the body of which reads as follows:

"In view of new facts revealed in further investigation and the expression of good faith as demonstrated by the hiring policies of Marketime Drugs, Inc., the investigator does not find reasonable cause for believing that discrimination has been committed and he recommends that the case be dismissed."

On December 14, 1959, the file in the case was certified to the chairman of the Board by the investigator. Thereafter, on December 16, 1959, the investigator filed further "Amended Findings of Investigator". In these amended findings it was stated, "The investigator believes that the manager and owners of Marketime Drugs, Inc., persist in their refusal to hire Mrs. Markey because of her race and because she has filed a complaint against the corporation."

The investigator again found reasonable cause for believing that a discriminatory practice had been committed.

On December 17, 1959, the chairman of the Board made an order reciting that a finding of reasonable cause had been made, that an unfair practice had been committed and that no agreement had been reached for elimination of the unfair practice. This order also constituted this tribunal. Further, on December 17, 1959, a notice of hearing was signed by the chairman notifying the respondents that this tribunal had been appointed "... to hold a hearing for the purpose of determining whether or not an unfair practice as defined by Chapter 49.60 R.C.W., in particular R.C.W. 49.60.180 and 49.60.210, has been committed by respondents."

The "Amended Finding" of November 25, 1959, was not included in the file of the case which was given to the tribunal at the outset of the hearing. Respondent's counsel urged that it must be made part of the file since it was denominated a "Finding". Counsel for the Board stated that it should not be received since it was in fact part of an unsuccessful conciliation effort. The tribunal received this "Finding" as part of the file in this case. The tribunal did not receive it as evidence nor consider it during its deliberations except insofar as its possible effect on the jurisdiction of the tribunal is concerned.

Counsel for the Board, the complainant, and respondents did not further mention this "Finding" during the hearing.

At the outset of the hearing respondent reserved the right to challenge the constitutionality of the Washington State Law Against Discrimination and to challenge whether this tribunal was properly constituted.

In this case the sequence of a finding of reasonable cause, then a finding of no reasonable cause, then again a finding of reasonable cause, muddles the file. If this incident reflects a practice on the part of the Board's staff of changing a finding of reasonable cause as a mark of official favor for undertakings entered into during conciliation discussions the practice, if continued, will confuse those complained against and may undermine public confidence in the Board's procedures. The Act contemplates a finding of reasonable cause, followed by conciliation efforts, and then a hearing if such efforts are unsuccessful. The finding of reasonable cause is jurisdictional and should be carefully deliberated. In the tribunal's opinion it should be changed solely because of new evidence discovered or the need to correct an error. The finding should not be bartered for conciliation undertakings.

Notwithstanding the foregoing considerations we find that the investigator has and must necessarily have the power to amend his findings. Since a finding of reasonable cause was made on December 16, 1959, coupled with a finding that no agreement for elimination of the alleged unfair practice had been entered into, the tribunal finds that the order of December 17, 1959, properly constituted it and that it has jurisdiction to hear the complaint specifying an unfair practice falling within the terms of R.C.W. 49.60.180. The omission of the Finding of November 25, 1959, from the file was a minor procedural irregularity which was corrected at the outset of the hearing and which prejudiced no one.

The tribunal further finds that it has before it no complaint or amended complaint properly charging an unfair practice under R.C.W. 49.60.210. Although counsel for the complainant at one point in the hearing asserted that the complainant would seek to prove such an unfair practice no motion to amend the complaint was made. Neither the amended findings by the investigator dated December 16, 1959, nor the notice of hearing of December 17, 1959, are a properly amended complaint by either the Board or the

complainant charging an unfair practice under R.C.W. 49.60.210.

### *The Hearing*

Complainant's case consisted of the sworn testimony of the complainant, Anita Markey, of Ralph Black, respondent, called by the Board as an adverse witness, of Judy Morgan and Janice Nagel, an employee and former employee, respectively, of Marketime and of Glen Mansfield and Lenore A. Paige, employees of the Washington State Board Against Discrimination. With the exception of Mr. Mansfield these witnesses were cross-examined by respondent.

Complainant introduced ten exhibits consisting of complainant's employment application with Marketime, certain payroll records, time cards, employment applications and W-4 withholding tax certificates for Federal income tax purposes, all taken from the business records of Marketime.

At the close of complainant's case respondents moved to dismiss the complaint. The tribunal reserved judgment on this motion and directed respondents to proceed.

Respondents' case consisted of the sworn testimony of C. A. Jackson, Vice president of Marketime, Ralph Black and Haywood Roberts, Marketime employees. Complainant cross-examined these witnesses. Respondents introduced ten exhibits consisting of a copy of the articles of agreement between the Retail Drug Clerks, Local Union No. 330, and the Seattle-King County Retail Druggists Association and Seattle Retail Drug Distributors Association, of which Marketime is a member, and additional time cards, payroll records and W-4 forms taken from the business records of Marketime.

Complainant called a rebuttal witness, Katherine E. Leptich, of the Queen City Employment Service of Seattle, Washington, and introduced one more exhibit, consisting of an employment application made to Queen City employment Service. Respondent cross-examined her.

After the close of the case two additional exhibits, consisting of additional employment applications and W-4 forms taken from the business records of Marketime, were received by the tribunal over the objection of counsel for respondents. The exhibits were not found to be material in disposing of the case.

Counsel for the Board, the complainant and for respondents presented oral argument. The hearing was then closed.

### *Respondents' motion to dismiss*

Respondents' motion to dismiss is denied. Sufficient evidence to support a finding that an unfair practice has been committed was introduced by complainant.

### *The complaint with respect to an unfair employment practice*

There were no discrepancies or substantial conflict among the material testimony of the various witnesses and the documentary evidence introduced except as to the reasons given by Ralph Black for his actions with respect to Mrs. Markey.

Marketime is a corporation engaged in the retailing of drugs, hardware, variety items and other special lines of merchandise through four self-service stores located in Seattle, Washington. Marketime employs eight or more persons and is an employer subject to the Washington State Law Against Discrimination. At the times mentioned in this proceeding Ralph Black was the manager of Marketime's new store at Broadway North and East Republican Streets, in Seattle, Washington, hereinafter referred to as the "Broadway store". As manager Mr. Black had and has final authority in behalf of Marketime to hire and fire persons who work at the Broadway store, with the exception of pharmacy personnel and the persons employed by a shoe concessionaire in the store. In hiring, Marketime and Mr. Black regularly receive and file written applications for employment. Mr. Black regularly uses these applications in deciding to employ persons at the Broadway store.

Complainant, Anita Markey, is 42 years old and colored. On November 9, 1959, she telephoned Marketime's Empire Way store and asked if they were hiring. She was told to call at the new Broadway store. On November 10, 1959, she called in person at the Broadway store and asked Mr. Black to give her an employment application form. She stated that she was interested in selling and cashiering work. Mr. Black declined to give her a form, stating that it would be no use for her to file an application. She asked if he was sure that it would be no use. Mr. Black repeated that he had many applications already and that it would be no use for Mrs. Markey to file an application. He again declined to give her one.

Mrs. Markey returned home, telephoned the Broadway store, and asked if they were receiving applications. A woman's voice answered and said



they were. Mrs. Markey testified that she heard Mr. Black's voice in the background say, "Tell them to come on down". Mr. Black's voice has a distinctive huskiness that would tend to make it readily identifiable. Mr. Black stated that he could not recall overhearing this telephone conversation nor the making of this remark.

Later that afternoon Mrs. Markey again telephoned the Broadway store, asked for and talked with Mr. Black. Apparently he did not recognize her voice. After she had briefly outlined her experience she was told to come in and fill out an application. Mr. Black did not recall this conversation.

Judy Morgan, a Marketime employee, testified that she applied for employment as a cashier at the Broadway store on November 10, 1959, in the early afternoon. She encountered no difficulty in securing an employment application. Her employment application, Exhibit 5, is dated November 10, 1959. That evening Mr. Black telephoned her and told her to report for work next day. She did. Exhibit 15 is a Marketime time card for Judy Morgan covering the weekly pay period ending on Friday, November 14, 1959, and showing that Judy Morgan began to work on Wednesday, November 11, 1959, at 8:32 a.m. Miss Morgan was employed as a store clerk, in work similar to that for which Mrs. Markey was applying.

On November 11, 1959, Mrs. Markey called at the store and again sought out Mr. Black. Upon asking for an employment application form she was given one. She inquired whether she could have a pencil to fill out the application and Mr. Black said that he doubted if he had a pencil. Mrs. Markey finally secured a pencil from Mr. Black and completed the application. Mr. Black took the application from her and remarked, "There, that's done". Mrs. Markey said that Mr. Black was polite. Mr. Black could not recall any of these remarks.

Mr. C. A. Jackson, who formerly managed a Marketime store and who has done direct hiring himself for Marketime, testified that written employment applications are regularly received by managers at all Marketime stores, whether Marketime is hiring or not. Mr. Black testified that he regularly uses the employment application file at the Broadway store in making hiring decisions. Both Mr. Black and Mr. Jackson also testified that occasionally spur of the moment hiring decisions are made by store managers and that in a certain number of instances, a

minority of perhaps three or four persons a week from among the total group of weekly applicants are not given employment applications. Counsel for respondent argued that since Mrs. Markey was not dealt with differently from these persons who are from time to time denied applications she was not discriminated against. The argument is ingenious, but we conclude that this practice simply shows that persons other than Mrs. Markey are also discriminated against when their treatment is measured against the usual company practice.

Since the filing of a written employment application is the usual first step in the Marketime hiring process it is apparent that if a person is denied an opportunity to file such an application he has been barred from and refused employment with Marketime.

Section 49.60.030 of the Washington State Law Against Discrimination defines the basic right protected by the Act as follows:

"The right to be free from discrimination because of race, creed, color or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

"(1) The right to obtain and hold employment without discrimination;

"(2) The right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement;

"(3) The right to secure publicly assisted housing without discrimination."

The act seeks to secure these rights by defining certain unfair practices. Among the unfair practices relating to employment as defined in section 49.60.180 of the Act are the following:

"It is an unfair practice for any employer:

"(1) To refuse to hire any person because of such person's race, creed, color or national origin, unless based upon a bona fide occupational qualification.

"(2) To discharge or bar any person from employment because of such person's race, creed, color or national origin..."

The evidence shows that on the evening of November 10, 1959, a decision to hire for selling and cashier work at the Broadway store was taken while Mrs. Markey's application for such work was not in the Marketime employment ap-

plication file, although she had asked for an opportunity to have it included. On November 10, 1959 Marketime was acting as part of the employment market in the Seattle community. By failing to accept Mrs. Markey's application she was denied equal access to that market and such opportunity for consideration for employment as having had her application on file at the Broadway store might have given her.

The evidence shows beyond cavil that Mrs. Markey was discriminated against because she was in fact treated differently from the great bulk of other applicants for jobs with Marketime.

Was this a forbidden discrimination based upon the race of Mrs. Markey as charged in the complaint and in the finding of December 16, 1959?

Respondent argues that the Act requires that the sole ground of the discrimination must be one of the prohibited grounds of race, creed, color or national origin in order to support a finding that an unfair practice has been committed. The language of the Act contains no such restriction. Since employment decisions are almost invariably dictated by more than one factor this construction would emasculate the Act. We feel that the Act simply states that whatever other grounds an employer may have for discrimination among person who apply to him for work, he may not, even in part, discriminate among them because of their race, creed, color or national origin.

Respondent also suggested that the tribunal must find beyond a reasonable doubt that an unfair practice has occurred. R.C.W. 49.60.250 provides that the tribunal shall base its findings "upon all the evidence". Rule 5-e. of the "Rules and Regulations Governing Practice and Procedure Before the Washington State Board Against Discrimination" provides that the hearing tribunal shall follow, so far as practicable, "... the rules of evidence and procedure governing civil proceedings in matters not involving trial by jury in the courts of the State of Washington". Under this rule the tribunal must be guided by the standard of proof applicable in ordinary civil cases in the courts of this State.

Mr. Black testified that in hiring for selling and cashier work at Marketime's Broadway store he was looking for women over eighteen and under thirty years of age, pleasing looking, with recent experience in working in drug stores or allied sorts of work in which the applicant had had a chance to meet the public.

Mrs. Markey's employment application, Exhibit 1, indicates that she had had eight or nine year's experience working in drug stores in Chicago, Illinois, in the period 1931 to 1939 and 1940 to 1941. Her application also indicates that she had had Christmas selling experience in Rhodes Department Store in Seattle in 1952 and 1957 and that she had had about four years direct door to door selling experience for World Book Company and for a cosmetic and hosiery concern. She has had three and one-half years of high school and graduated from a beauty college. Her attempt to return to work has been undertaken because permitted by her children's attainment of school age.

Mr. Black said that his initial impression of Mrs. Markey was that she was neatly dressed. He did not say her manner was unpleasant. Her demeanor on the stand confirms that her manner is pleasant.

Mr. Black at one point testified that he had "dismissed" Mrs. Markey's application because of her age and because of her lack of experience. He did not know her experience or her exact age when he declined to receive her application. He testified that he did not recall Mrs. Markey's second telephone call on November 10, 1959, when she stated her experience to him. Mr. Black hired Judy Morgan that evening. Moreover, the reason then given to Mrs. Markey by Mr. Black for not taking her application was that he already had enough applications.

An 18 year old girl, Janice Nagel, applied for work on November 5, 1959. Her experience as stated in her employment application, Exhibit 4, dated from September, 1958. She had worked for less than six months as a "produce and cashier" (sic), and had then held three jobs in brief succession as a nurse and waitress.

Judy Morgan, hired on November 11, 1959, was 20 years old and had had employment experience from April to August, 1959, as a cashier in a Woolworth's store in Seattle, Washington. She applied and was hired as a cashier.

With respect to age, on November 5, 1959, Mr. Black took the application of Alice L. La-Marche, who on her application, Exhibit 9, stated that she was 34 years old. She applied for work as a cosmetician. Her application shows that she had had some drug store experience.

On November 17, 1959, the application, Exhibit 10, of Caroline May Groves was received for cashiering work. Her age was 45.

On the application of Dorothy Holman, Ex-

hibit 8, for a clerk's position, her age is stated to be 50 and by the birthdate given is in fact 52.

Mr. Black testified that a Mrs. Mahlstrom, aged 45, had been hired to operate the cosmetics counter. She was a transfer from another Marketime store. Mr. Black stated that he had had the final decision on whether she could be hired at the Broadway store.

Fifteen employment applications were introduced as Exhibit 19 and assigned letters. To date, none of these persons has been hired by Marketime. The ages stated on these employment applications, which were all received during the period October 8, 1959, through November 18, 1959, were as follows:

Exhibit	Age of Applicant
19 - A	36
B	16
C	17
D	49
E	29
F	51
G	20
H	35
I	36
J	21
K	17
L	36
M	17
N	21
O	48

It is apparent that age was not consistently used by Mr. Black in determining who should be allowed to file an application.

Mr. Black's testimony with respect to this matter is inconsistent with the documentary evidence of his actions.

On cross-examination Mr. Black also stated that he declined to receive Mrs. Markey's application because he then had no position open. Miss Morgan was hired by telephone call that evening. Mr. Black further testified that Mrs. Markey's color and race had nothing to do with his refusal to accept her application on November 10, 1959.

Mr. Black's memory of his reasons for his actions towards Mrs. Markey on November 10, 1959, seemed quite fresh, but it is belied by the documentary evidence of his other actions. His memory with respect to conversations and other material matters about this incident failed him at a number of critical points. He testified that he was quite rushed at that time and could not

be expected to remember things of this sort. But Mr. Mansfield, the Board's investigator, visited the Broadway store and spoke to Mr. Black on November 16, 1959, only five days after this incident. Mr. Black had an early occasion to think about these matters. Mrs. Markey's descriptions of events and her memory of the incidents were clear and were not shaken by cross-examination. They are consistent with the documentary evidence introduced.

Mr. Black's stated reasons for his action were evidently not those which actually moved him. Mr. Black's testimony that he refused to give employment applications to other persons was not buttressed by testimony from Mr. Black as to specific instances. The sole specific instance as to which we have detailed evidence is that of Mrs. Markey, who is colored.

Mr. Black testified that this was his first job as manager and that he was most anxious to prove himself and to succeed at the job.

Mr. C. A. Jackson's testimony indicates that prior to this incident Marketime has from time to time employed non-whites in other stores. They presently employ Haywood Roberts, a Negro, as a warehouse clerk. Mr. Roberts testified that he has charge of the warehouse which serves the four Marketime stores. He supervises white employees. He testified to his absence of any feeling of being discriminated against on account of his race or color by the three chief officers, directors and shareholders of Marketime, Mr. John Davis, Mr. C. A. Jackson and Mr. G. W. Thorpe. As warehouse clerk he has on occasion dealt with customers of the store, particularly in connection with replacing damaged or returned goods. He has never been discouraged from dealing with the public in this respect.

Mr. C. A. Jackson testified that Marketime has no established policy or written directives to store managers to avoid prohibited discriminatory practices in hiring. He pointed out that the firm has been growing rapidly in recent years and that this is a facet of the company's personnel program which has so far not received formal attention by Marketime's management.

As has been pointed out, Mr. Ralph Black represented Marketime as their employee and agent for hiring and firing personnel at the Broadway store during the events complained of by Mrs. Markey. His actions were clearly within the scope of his employment as store manager of the Broadway store. In this area of law, as in others, the corporate principal is repre-

sented by and must bear the burden of its agent's actions. On November 10, 1959 the corporate person, Marketime, acted through the person of Ralph Black. The fair attitudes and actions of the overall management of Marketime cannot suspend this underlying responsibility of the principal for the acts of its agent within the scope of his employment. Through mischance or oversight Marketime's management apparently failed to communicate its affirmative attitude on non-discriminatory hiring practices to Mr. Ralph Black prior to his assuming his duties as manager of the Broadway store. Under the circumstances the corporate principal must be held accountable for Mr. Black's actions.

The tribunal has concluded that all of the evidence preponderates in favor of a finding that the fact that Mrs. Markey is a Negro was a substantial cause in inducing Mr. Black to decline to permit her to file an employment application on November 10, 1959. We further conclude that in declining to receive her application she was discriminated against because of her race.

During the hearing Mrs. Markey stated that she has recently made arrangements for another job which will begin in about one month. Neither she nor her counsel asked that the tribunal order respondents to employ her for the brief period before she begins that work.

In view of the foregoing facts, and our formal findings set forth below, the tribunal concludes that Ralph Black and Marketime Drugs, Incorporated, discriminated against Mrs. Anita Markey on November 10, 1959, in violation of both subsection (1) and (2) of R.C.W. 49.60.180.

#### FINDINGS OF FACT

##### I

Complainant, Anita Markey resides at 1520 24th Avenue North, in Seattle, King County, Washington. She is a Negro.

##### II

Marketime Drugs, Incorporated is a Washington corporation engaged in the business of selling drugs, variety items, hardware and related merchandise in King County, Washington. During the times mentioned herein it was operating four stores in King County, Washington. One of these, located at the intersection of Broadway and East Republican Streets in Seattle, Washington, was being readied for business on November 10, 1959. Marketime employs more than eight persons.

##### III

On November 10, 1959, Ralph Black was the manager of the Marketime store at Broadway and East Republican Streets, Seattle, Washington.

##### IV

As manager of the store mentioned in Finding II Ralph Black had authority over the hiring and firing of store help aside from persons employed in the pharmacy department and in a shoe concession located in the store. In hiring and firing he acted within the scope of the authority given him by Marketime.

##### V

Marketime regularly receives written employment applications from persons applying to them for work. The applications are supplied to applicants. The employment applications are normally used by store managers for Marketime in making employment decisions. Filing an employment application is the usual first step in obtaining employment with Marketime.

##### VI

On November 10, 1959, Anita Markey requested that Ralph Black give her an employment application form. Ralph Black declined to do this.

##### VII

Ralph Black declined to give Anita M. Markey an employment application form because of her race.

##### VIII

The denial of Anita Markey's request for an employment application form barred her from employment at the Marketime Store on Broadway and East Republican Streets on November 10, 1959, and constituted, at that time, a refusal of employment.

##### IX

The action by Ralph Black in denying Anita Markey's request for an employment application form is an unfair practice as defined in subsections (1) and (2) of R.C.W. 49.60.180.

##### X

Anita Markey has recently made other employment arrangements.

#### ORDER

IT IS HEREBY ORDERED that respondents Ralph Black and Marketime Drugs, Incorporated shall cease and desist from the unfair practice of barring persons from employment and refusing them employment because of their race.  
DATED January 25, 1960.



## EMPLOYMENT

### Labor Unions—Federal Statutes

Certain members of a Memphis, Tennessee, local union complained to the United States Department of Labor that the international auto workers union of which it is a part had violated the section of the Labor-Management Reporting and Disclosure Act of 1959 which provides that a trusteeship may be established only in accordance with the constitution and by-laws of the organization assuming trusteeship over a subordinate body and for the purpose (among others) of "carrying out the legitimate objects of such labor organization." Complainants charged that the local was put under the trusteeship in order to force integration of its meeting hall washroom and drinking fountains. The ruling on the complaint, announced August 4, 1960, in a departmental fact sheet, was in favor of the international because an investigation disclosed that the international had followed procedural requirements and had established the trusteeship to carry out the legitimate objective of its constitution "to unite in one organization regardless of . . . race, creed [and] color . . . , all employees under the jurisdiction of the international union."

Fact sheet on a recent ruling by the Department of Labor under authority of the Labor-Management Reporting and Disclosure Act of 1959:

*Unions involved:* the United Auto Workers International Union and UAW Local 988 of Memphis, Tenn.

*Complaint:* certain members of the Local charged that the International violated Section 302 of the Act in placing the Local under trusteeship, an action that was taken after the Local's refusal to desegregate washrooms and drinking fountains in the union meeting hall.

*Ruling:* for the International. An investigation by the Bureau of Labor-Management Reports showed that the International had followed its procedural requirements in establishing the trusteeship and that the trusteeship was established for the purpose of carrying out the legitimate objectives of the International.

*Backgrounds* During a two-year period members of the Local repeatedly petitioned the international union to take action to eliminate racial discrimination and segregation in the Local, alleging systematic exclusion of Negroes from all union committees and segregation of rest rooms and water coolers in the union hall.

About 500 of the Local's approximately 1800 members are Negroes.

In January 1960 the International's Executive Board, after a hearing was conducted, adopted a resolution authorizing the establishment of a trusteeship over the Local.

In a report filed with the Bureau of Labor-Management Reports, the International stated that the trusteeship was instituted because "the local union was continuing a course of discriminatory and unequal treatment of members on the grounds of race and particularly in its maintenance of separate washroom facilities for the exclusive use of white and non-white members respectively. . . ."

After the trusteeship was established certain other members of the Local filed a complaint with the Department of Labor alleging that the trusteeship had not been established for the purpose authorized by Section 302 of the Act. The complaint charged that the International had no right "to force integration."

One of the objectives of the International, as outlined in its constitution, is "to unite in one organization regardless of religion, race, creed, color, political affiliation or nationality, all employees under the jurisdiction of the international union."

Section 302 of the Act states: "Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."

## HOUSING

### Discrimination—Michigan

A prospective home owner in one of five Grosse Pointe suburban communities near Detroit complained in a civil suit that he was denied the right to buy a home because of a community "point system" of rating home buyers on a standard which includes consideration of national origins. An investigation by the state corporation commissioner and the attorney general followed, and an order was issued against continuation of the practice. The order allowed 30 days for compliance by the Grosse Pointe Property Owners Association, the Grosse Pointe Brokers Association and Grosse Pointe Properties, Inc. At the hearings, spokesmen for these groups explained that the system was designed merely to advise prospective sellers of a prospective buyer's background, and asserted that there was nothing to prohibit an owner from selling to anyone of his choice. They described the plan as designed to protect property values. 5 Race Rel. L. Rep. 567. Subsequently, the State Corporation and Securities Commission held public hearings and adopted rules prohibiting real estate agents from discriminating on the basis of race, color, religion, national origin or ancestry.

Equality of opportunity and treatment of all citizens is an important aspect of the public policy of the State of Michigan. Each agency of state government has a responsibility to further that policy; so it is with the Michigan Corporation and Securities Commission.

On May 13, after six days of hearings concerning the activities of licensed real estate brokers and salesmen in connection with the Grosse Pointe point system, the Attorney General and I stated that:

"The information which has been received into the record in this proceeding has made it clear that additional rules and regulations are needed governing the activities of real estate brokers as to unlawful activities by brokers under a screening system based upon discrimination in regard to race, color, or creed. The Corporation and Securities Commission will immediately undertake the preparation and promulgation of an adequate rule."

On May 27 a specific rule was proposed, spelling out the prohibition of unfair dealings to include discrimination based on race, color, religion, national origin, or ancestry. This was submitted to the Attorney General who approved it as to form and legality.

Although public hearings are not required in the promulgation and adoption of such rule, the Commission determined that in the public interest they should be held. Two public hearings on the proposed rule were held; one in Detroit on June 21, the other in Grand Rapids on June 28. Testimony taken at the several hearings clearly indicates that certain practices of real

estate brokers and salesmen were designed to restrict the opportunity of purchasers, sellers and licensees to transact business freely without discrimination. The preponderance of testimony heard confirms the need for the proposed rule.

Counter proposals, offered as a substitute for the proposed rule, were considered by the Commission. These proposals are unacceptable in that they would give state sanction to discriminatory action by brokers and salesmen when so instructed by their principals.

The rule affects real estate brokers and salesmen, defining their obligation to offer their services to the public as licensees of the state without reservation because of race, color, religion, national origin, or ancestry.

The Corporation and Securities Commission finds no reason to modify the rule as initially promulgated, and accordingly has formally adopted Rule 9 (copy attached) and is submitting it this day to the Secretary of State. The rule will become effective when published in the next supplement of the Administrative Code.  
June 30, 1960

Lawrence Gubow

Commissioner

Michigan Corporation and Securities Commission

## REGULATION

The Michigan Corporation and Securities Commission, by authority of Section 8, Act No. 306, P.A. 1919 (C.L. 1948, Section 451.201 et seq), amends its Real Estate Division Rules and Regulations by adding Rule 9 under the preamble reading as follows:

"Any broker or salesman who fails or neglects to abide by the following rules and regulations adopted by the Michigan Corporation and Securities Commission shall be presumed to be guilty of unfair dealing:" Said added rule to read as follows:

**R 501.309**

9. A broker or salesman, acting individually or jointly with others, shall not refuse to sell or offer for sale, or to buy or offer to buy, or to appraise, or to list, or to negotiate the purchase, sale, exchange or mortgage of real estate, or to negotiate for the construction of buildings thereon, or to lease or offer for lease, or to rent or offer for rent, any real

estate or the improvements thereon, or any other service performed as broker or salesman, because of the race, color, religion, national origin or ancestry of any person or persons.

A broker or salesman, acting individually or jointly with others, shall not refuse to sell or offer to sell, or to buy or offer to buy, or to receive an offer to sell or to buy, or to lease or offer for lease, or to negotiate the purchase, sale or exchange of a business, business opportunity, or the good will of an existing business, or any other service performed as broker or salesman, because of the race, color, religion, national origin or ancestry of any person or persons.

## HOUSING

### Publicly-Assisted Housing—Massachusetts

**COMMISSION AGAINST DISCRIMINATION** on relation of **Ulysses G. MARSHALL, Complainant v. MIDDLESEX HOMES, INC., et al.**

Massachusetts Commission Against Discrimination, August 22, 1960, PRH 11-9-C.

**SUMMARY:** A Negro, who had unsuccessfully attempted to purchase a house in a development near Danvers, Massachusetts, filed a complaint with the state Commission Against Discrimination, alleging that the subdivision's corporate developer-owner, the corporate real estate agency having the sole right to sell houses in the development, and the presidents of those corporations had engaged in unlawfully discriminatory practices as defined in the state's "Fair Housing" law [2 Race Rel. L. Rep. 1155 (1957), 4 Race Rel. L. Rep. 453 (1959)]. After a hearing, the commission determined that many of the houses for sale in the subdivision were covered to some extent by an FHA commitment; that employees of the real estate agency had refused on divers occasions to show claimant houses in the development and to treat him as a prospective customer; that, knowing of these discriminatory acts, the vice-president of the developer-owner corporation took no action to disaffirm them; that, during the subsequent investigation by the Commission, respondents had "stood mute" when asked if they would accept a proffer of complainant to purchase a home in the development; and that respondent's conduct toward complainant is part of "a studied pattern of discouraging and avoiding" the applications of Negroes to purchase houses in the subdivision. The commission concluded that unlawful discriminatory practices had been engaged in by all of the respondents except the president of the corporate developer-owner, against whom the complaint was dismissed. The other respondents were ordered to cease and desist from refusing complainant the opportunity to purchase an available home of his choice in the development; and from considering factors of race, creed, color, or national origin in seeking purchase applications concerning, or in showing, houses in this or other developments. They were also ordered to take certain affirmative action in servicing complainant's application to purchase a house of his choice in the development; to apply equal standards of evaluation to all applicants for houses in this and other develop-

ments without regard to race, creed, color, or national origin; to issue written instructions to officers, agents, and employees of both corporations, explaining the requirement and objective of the law against discrimination and advising each of them of his obligation meaningfully and effectively to comply with that law; to post copies of the statement in conspicuous and easily accessible places in the model houses in this and other developments; to include in all advertising of houses in this and other developments a notice that such developments are subject to the state law against discrimination and that the houses therein are available for sale without reference to race, creed, color, or national origin; and to notify the commission within a specified time as to steps taken to comply with each item of the order.

Upon all the evidence at the hearing herein the Massachusetts Commission Against Discrimination, by Presiding Hearing Commissioner Chairman Mildred H. Mahoney and Hearing Commissioner Ben G. Shapiro, finds that the respondents Middlesex Homes, Inc., Frank Equi, President, Middlesex Homes, Inc., and Campanelli Builders, Inc. herein have engaged in unlawful discriminatory practices as defined in Chapter 151 B, Section 4, Sub-section 6 of the Massachusetts General Laws, and that the respondent Alfred Campanelli, President of Campanelli Brothers, Inc. has not engaged in unlawful discriminatory practices as therein defined, and states its findings of fact as follows:

#### FINDINGS OF FACT

##### *The Complainant*

1. The complainant, Ulysses G. Marshall, is a Negro, who on January 18, 1960, sought to purchase a home located in the housing development situated in Danvers, Massachusetts, and known as "Woodvale in Danvers".

##### *The Housing Accommodations*

2. "Woodvale in Danvers" is a real estate development located in Danvers, Massachusetts, and consisting of no less than two hundred house lots that are contiguous, exclusive of public streets, as set out in a sub-division control plan filed with the Clerk of the Danvers Planning Board on May 15, 1959 by the respondent Campanelli Builders, Inc.

3. The lots are not sold separately but are sold only together with the houses thereon. On January 18, 1960, there were a number of houses in the development unsold.

4. The prices for a home in "Woodvale in Danvers" start at \$14,900. with special terms for veterans.

##### *The Respondents*

5. The respondents Middlesex Homes, Inc.,

and Campanelli Builders, Inc. are both corporations duly organized and existing under the laws of Massachusetts. The respondent Frank Equi is President of Middlesex Homes, Inc. The respondent Alfred Campanelli is President of Campanelli Brothers, Inc., also a corporation duly organized and existing under the laws of Massachusetts.

The respondent Campanelli Builders, Inc. is a substantial real estate developer in the business of purchasing substantial tracts of land, subdividing the same into lots, then building and selling homes thereon to the public. Campanelli Builders, Inc. is the developer and present owner of "Woodvale in Danvers". One of its officers is authorized to execute the agreements for the purchase and sale of "Woodvale" houses sold to members of the public.

Middlesex Homes, Inc. is the exclusive sales agent of Campanelli Builders, Inc. in respect to "Woodvale in Danvers" and other developments owned by Campanelli Builders, Inc. Middlesex Homes, Inc. has the sole right to sell the homes in the "Woodvale in Danvers" development to the public. It sells the homes through such media as newspaper advertisements, road signs, brochures, and particularly through the display of so-called "model homes" located within the development. The model homes are staffed, to the extent that their numbers permit, with salesmen in the employ of Middlesex Homes, Inc., who are authorized to show the property to prospective customers and to discuss with them the terms and conditions of purchase. The model homes are open for inspection by the general public, whose patronage is solicited by newspaper advertising. The model homes are furnished by Middlesex Homes, Inc., whose salesmen, in addition to selling, have the managerial duties of cleaning the model homes, straightening them up and otherwise performing general housekeeping chores, and opening and closing them to the public.

Middlesex Homes, Inc. has the practice of



using one of the model sales homes within the development as a temporary sales office. It maintains a permanent sales office in Woburn, Massachusetts.

The respondent Frank Equi, President of Middlesex Homes, Inc. is the active managing head of the company and possesses detailed knowledge of its day-to-day workings. He has had extensive experience in servicing large real estate sub-division developments in Massachusetts.

6. At least 70 to 80 houses at "Woodvale in Danvers" for sale at the time of the matters complained of were, at least in part, covered by an outstanding commitment issued after October 1, 1957, by the Federal Housing Administration. By virtue of such commitment, acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the payment of which is guaranteed or insured by the Federal Housing Administration, an agency of the Federal Government created by the National Housing Act, as amended, (12 U.S.C. Chapter 13).

7. The "sponsor" of the commitment applications for the realty in question was the respondent Campanelli Builders, Inc. The applications for "Woodvale" commitments were often prepared for the lending institution involved by an employee of Campanelli Builders, Inc. Of the commitments in question as of January 18, 1960, there were at least three lots in the "Woodvale in Danvers" development then unsold which were covered by conditional commitments.

#### *The Unlawful Discriminatory Practices*

8. The record does not support the allegation that the respondent Alfred Campanelli, President of Campanelli Brothers, Inc., has engaged in unlawful discriminatory practices as defined in Chapter 151B, Section 4, Sub-section 6, of the Massachusetts General Laws.

9. On January 18, 1960, and on divers occasions prior thereto, as the result of advertising in Boston newspapers, the complainant, Ulysses G. Marshall, a bona fide would-be purchaser, sought to purchase housing accommodations in the housing development known as "Woodvale in Danvers", situated in Danvers, Massachusetts, and visited one of the model homes in the development for that purpose. On January 18, 1960, and on divers occasions prior and subsequent thereto, such accommodations were denied

and withheld from the complainant because of his color. The denial and withholding was constituted, in part, by the refusal of certain employees of the respondent Middlesex Homes, Inc., to show the complainant homes within the development or in any way to deal with him as a prospective customer on those occasions when he visited both the model home and after he departed.

10. The respondent Campanelli Builders, Inc., has discriminated and is discriminating against the complainant by denying and withholding from him, because of his color, housing accommodations, whether or not publicly assisted, located in "Woodvale in Danvers".

The discriminatory actions of the persons acting in an agency capacity for the respondent Campanelli Builders, Inc., as further set out herein, were brought to the attention of Michael Campanelli, its Vice President, who at no time subsequently by any action sought to disaffirm these discriminatory actions, and whose attorneys and agents during the course of investigation and hearing on the matter herein complained of have constantly "stood mute" when asked if Negroes generally, and the complainant, Ulysses G. Marshall in particular, could purchase housing accommodations in "Woodvale in Danvers".

The respondents Middlesex Homes, Inc., and Frank Equi, President of Middlesex Homes, Inc., have discriminated and are discriminating against the complainant by refusing to allow him, because of his color, the opportunity to attempt to purchase a home in "Woodvale in Danvers". The discriminatory actions of the persons acting in an agency capacity for these respondents were brought to the attention of the respondent Frank Equi, who at no time subsequently by action sought to disaffirm these discriminatory acts, and whom himself, and whose attorneys and employees during the course of investigation and hearing on the matter herein complained of have consistently "stood mute" when asked if Negroes generally and the complainant, Ulysses G. Marshall in particular, could purchase housing accommodations in "Woodvale in Danvers".

11. The respondents Campanelli Builders, Inc., Middlesex Homes, Inc., and Frank Equi, President of Middlesex Homes, Inc., have accorded to the complainant, Ulysses G. Marshall, upon the occasion of his attempt to purchase a home in "Woodvale in Danvers" different treatment from that customarily accorded white applicants. White applicants at the model homes

are dealt with by the salesmen and as prospective customers, are given appropriate application forms to fill out, and are otherwise regarded as a source of actual or potential sales. On the other hand these salesmen evaded as much as was in their power making contact with the complainant.

12. The respondents Campanelli Builders, Inc., Middlesex Homes, Inc., and Frank Equi, President of Middlesex Homes, Inc., have consistently refused, and still consistently refuse, to accept or process the application of the complainant, Ulysses G. Marshall, to purchase a home in "Woodvale in Danvers", which refusals are based solely on Ulysses G. Marshall's color. During the course of the investigation and hearing on the matters herein complained of this Commission, the complainant himself, and his attorney have consistently asked if the respondents would accept a proffer of the complainant to purchase a home in the development, to which proffer the respondents consistently "stood mute".

13. The refusals of the respondent Campanelli Builders, Inc., to sell the complainant Ulysses G. Marshall a home, and the refusal of the respondent Campanelli Builders, Inc., Middlesex Homes, Inc., and Frank Equi, President of Middlesex Homes, Inc., to accept or process the complainant's, Ulysses G. Marshall's, application to purchase a home in "Woodvale in Danvers" is part of a studied pattern of discouraging and avoiding the application of Negro applicants for the purchase of homes in "Woodvale in Danvers".

### ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to Section 5, Chapter 151B, of the General Laws of Massachusetts, it is hereby

**ORDERED**, by the Massachusetts Commission Against Discrimination,

That the complaint against the respondent Alfred Campanelli, President, Campanelli Brothers, Inc., be, and the same hereby is, dismissed.

That the respondents Campanelli Builders, Inc., Middlesex Homes, Inc., their officers, directors, agents, successors, and assigns, and that the respondent Frank Equi, President of Middlesex Homes, Inc., shall:

1. Cease and desist from:

a. Denying to and withholding from complainant, Ulysses G. Marshall, the opportunity

to purchase an available home of his choice located in the development known as "Woodvale in Danvers" situated in Danvers, Massachusetts.

b. Giving consideration to the factors of race, creed, color or national origin, in seeking application for the purchase of homes in "Woodvale in Danvers" or other developments owned, controlled, or serviced by them which are subject to the Massachusetts Law Against Discrimination.

c. Giving consideration to the factors of race, creed, color or national origin in showing model homes or other homes in the "Woodvale in Danvers" or other real estate developments owned, controlled, and serviced by them which are subject to the Massachusetts Law Against Discrimination.

2. Take the following affirmative action which, in the judgment of the Massachusetts Commission Against Discrimination, will effectuate the purposes of the Massachusetts Law Against Discrimination:

a. With respect to the housing accommodations sought by the complainant:

(i) The respondent Campanelli Builders, Inc., shall within thirty (30) days of the date of service of this Order set aside for and make available to the complainant an available home of his choice located in "Woodvale in Danvers", and

(ii) The respondent Middlesex Homes, Inc., shall within thirty (30) days of the date of service of this Order prepare, and respondent, Campanelli Builders, Inc., shall within thirty (30) days of the date of service of this Order execute, a purchase and sale agreement for an available home of the complainant's choice in the "Woodvale in Danvers" development, and shall present the same to the complainant. The complainant shall have a reasonable amount of time within which to accept or reject said purchases and sale agreement for an available home of his choice in the "Woodvale in Danvers" development.

b. If the complainant accepts such said offer to purchase, and the house chosen by him is not ready for occupancy, the complainant shall be accorded substantially the same privileges, services, benefits, guarantees, concessions, accorded to the most favorable among other purchasers of unfinished homes at "Woodvale in Danvers".

3. Apply forthwith the same standards of evaluation to all applicants for homes at "Woodvale in Danvers" and other developments owned by the respondent, Campanelli Builders, Inc., which are subject to the Massachusetts Law Against Discrimination without regard to race, creed, color or national origin.

4. Issue forthwith written instructions in a form satisfactory to the Commission to all officers, directors, agents, and employees of Campanelli Builders, Inc., Middlesex Homes, Inc., and to all persons now engaged or employed or who may hereafter be employed or engaged within one year of the date of this order, by these respondents, explaining the requirement and objectives of the Law Against Discrimination and advising each such person of his individual responsibility for compliance with the Law Against Discrimination and his obligation to make such compliance meaningful and effective. Copies of such instructions signed by the said persons individually and acknowledging receipt and understanding thereof shall be transmitted to the Commission by the respondents within thirty (30) days of the date of the service of this Order.

5. Post forthwith copies of the foregoing statement conspicuously in easily accessible and well-lighted places at the model homes at "Woodvale in Danvers" and other developments owned or

controlled by the respondent, Campanelli Builders, Inc., or serviced by the respondent, Middlesex Homes, Inc., or the respondent, Frank Equi, President of Middlesex Homes, Inc., which are subject to the Massachusetts Law Against Discrimination where they may be readily observed by those seeking to purchase housing accommodations located therein.

6. Include forthwith in all advertising of the houses at "Woodvale in Danvers" and at other developments which are subject to the Massachusetts Law Against Discrimination owned or controlled by the respondent Campanelli Builders, Inc., or serviced by the respondent Middlesex Homes, Inc., or the respondent Frank Equi, President of Middlesex Homes, Inc., by newspaper, floor plan, pamphlet, booklet, sign or otherwise, a statement, in a form satisfactory to the Commission, giving notice that "Woodvale in Danvers" and other said developments, are subject to the said Massachusetts Law Against Discrimination, and that the houses therein are available for sale without reference to race, creed, color or national origin.

7. Notify the Massachusetts Commission Against Discrimination at its office at 41 Tremont Street, Boston 8, Massachusetts, in writing within forty (40) days of the date of service of this order, as to steps respondents have taken to comply with each item of this Order.

## STATE GOVERNMENT "Code of Fair Practices"—New York

The governor of New York has issued an executive order establishing a "Code of Fair Practices" reaffirming the state's policy of prohibiting discrimination because of race, creed, color, national origin or age in all areas of governmental activity.

STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY

*Preamble*—Our spiritual heritage proclaims the supreme worth of the individual and the equality of opportunity for each individual to pursue self-realization. This American passion for justice and equality in freedom not only stirred us

to life as a nation, but has continued to serve as our national purpose.

Our capacity as a people to express this heritage, to give it newer and broader meaning and application, is again being tested today—in our nation and in the world. It is only the fullest expression of this heritage that can give meaning to our way of life.

The State of New York has been a leader in the furtherance of individual worth, justice, equality and freedom. It has been in the forefront in the elimination of discrimination based on race, color, creed or national origin, but it is imperative that our cooperative efforts be strengthened and sustained to further this noble cause.

In pursuit of the State's basic policy against discrimination, the following Code of Fair Practices shall obtain throughout the Executive Branch of State Government:

#### ARTICLE I

##### *Appointment, Assignment and Promotion of State Personnel*

State officials and supervisory employees shall appoint, assign and promote State personnel on the basis of merit and fitness, without regard to race, color, creed, national origin or age. State agencies shall bar from all employment application forms any inquiry expressing any limitation or specification as to race, color, creed, national origin or age, unless it relates to a bona fide occupational qualification.

#### ARTICLE II

##### *State Action*

In performing their service to the public, the agencies of the State shall not discriminate because of race, color, creed, national origin or age, nor shall they authorize the use of State facilities in furtherance of discriminatory practices.

#### ARTICLE III

##### *Public Contracts*

Every State contract for public works or for goods or services shall contain the clauses prescribed by Section 220-e of the Labor Law barring discrimination on account of race, color, creed or national origin, and such contractual provisions shall be fully and effectively enforced.

#### ARTICLE IV

##### *State Employment Services*

Any State agencies engaged in employment referral and placement services for private industry or public agencies shall fill all job orders on a non-discriminatory basis, and shall decline any job order carrying a specification or limitation as to race, color, creed, national origin or age, unless it relates to a bona fide occupational

qualification. Information concerning employers believed to engage in discriminatory practices shall be referred by State agencies to the State Commission Against Discrimination for investigation and conciliation and, if appropriate, the matter shall then be referred to the Industrial Commissioner or Attorney General for the exercise of their statutory authority to commence proceedings before the State Commission Against Discrimination.

#### ARTICLE V

##### *Training for Job Opportunities*

All educational and vocational guidance counseling programs and all apprenticeship and on-the-job training programs of the State shall be conducted to encourage the fullest development of interests and aptitudes, without regard to race, color, creed, national origin or age.

#### ARTICLE VI

##### *State Financial Assistance*

In granting State financial assistance, State agencies shall be vigilant to further the State's policy of non-discrimination and shall give appropriate attention to discriminatory practices engaged in by any applicant or recipient.

#### ARTICLE VII

##### *State Forms*

All State agencies shall avoid in forms or requests for information any item or inquiry expressing any limitation or specification as to race, color, creed, national origin or age, unless the item or inquiry is expressly required by statute or is required in good faith for a proper purpose and prior notification of its use has been given by the agency to the State Commission Against Discrimination.

#### ARTICLE VIII

##### *State Licensing and Regulatory Agencies*

Where a respondent in a proceeding before the State Commission Against Discrimination is subject to the licensing or regulatory power of another State agency, the State Commission Against Discrimination shall notify the State agency of the pendency of such proceeding. If, thereafter, the respondent is found by the State Commission Against Discrimination, after notice and an opportunity to be heard, to have engaged in a discriminatory practice, the State



agency shall be so notified and shall take appropriate action consistent with the exercise of its licensing or regulatory power.

#### ARTICLE IX

##### *Cooperation With the State Commission Against Discrimination*

All State agencies, in accordance with the provisions and intent of the State Constitution and the State's laws against discrimination, shall cooperate fully with the State Commission Against Discrimination and duly comply with its requests and recommendations for effectuating the State's policy against discrimination.

#### ARTICLE X

##### *Conduct by the State's Representatives*

State officials and employees shall be ever mindful of the democratic heritage of the State which abhors any discrimination on the basis of race, color, creed, national origin or age, and shall take all necessary steps to effectuate the provisions and intent of this Code of Fair Practices.

#### ARTICLE XI

##### *Publication of Code of Fair Practices*

Copies of this code shall be distributed to all State officials and employees and copies shall be posted in conspicuous locations in all State facilities.

NELSON A. ROCKEFELLER

Governor of the State of New York

July 15, 1960

Albany, New York

## REFERENCE

### Legal Aspects of the Sit-In Movement

More than twenty states have laws making it illegal to refuse service on the basis of race or color in places of public accommodation (including, usually, establishments selling food for consumption on the premises). See generally 2 Emerson and Haber, *Political and Civil Rights in the United States* (2d ed.), pp. 1405-1422; and "Race Relations Law Survey," 2 *Race Rel. L. Rep.* 881, 903-905 (1957). The Congress of Racial Equality ("CORE") has for a number

of years apparently utilized the "sit-in" technique as a means ("direct, non-violent") of enforcing the rights to service created by such laws. See the various issues of CORElator published by this organization; compare *Chicago v. Corney*, (Ill. App. Ct. 1957), 142 N.E.2d 160, 2 *Race Rel. L. Rep.* 821 (1957). The great interest during the last year has been occasioned by the extensive use of the device in Southern states which have no such public accommodation laws.

#### I. Factual Background

The current wave of lunch counter sit-in demonstrations originated in Greensboro, North Carolina. On February 1, 1960, four freshmen students at the North Carolina Agricultural and Technical College entered a dimestore, made several purchases, then sat down at the lunch counter and ordered coffee. Service was refused. The Negro students remained seated until the store closed. *New York Times*, March 26, 1960, p. 1, col. 3.

Subsequently, demonstrations spread across the South from Virginia to Texas. In Miami, as in Nashville and a few other cities, bi-racial committees were appointed to work toward amicable settlement. *Washington Post*, April 15, 1960, p. 2, col. 2.

By August, 1960, these activities by Negroes had led to desegregation of some eating facilities in such cities as: Alexandria, Arlington, and Richmond, Virginia; Austin, Corpus Christi, Dallas, Galveston, and San Antonio, Texas; Chapel Hill, Charlotte, Winston-Salem, and Salisbury, North Carolina; Chattanooga, Knoxville, and Nashville, Tennessee. Further evidence of the considerable social and political significance of the movement may be found in the attention devoted to it in both major party platforms in 1960. The Democratic plank specifically endorses "sit-in" demonstrations as a challenge "to make good . . . the guarantees of our Constitution." The Republican platform reaffirms the right of peaceful assembly and

"applaud[s] the action of the businessmen who have abandoned discriminatory practices . . . and urge [s] others to follow their example." 49 *U.S. News and World Report* [No. 4] 67 (1960). In the brief for the United States as *Amicus Curiae* filed in *Boydton v. Virginia* in September, 1960, the Solicitor-General has urged the Supreme Court to accept the argument that state enforcement or support of racial discrimination in an interstate bus terminal restaurant infringes Fourteenth Amendment rights. The decision in this case should go far to clarify the legal status of rights involved.

#### Arrests; Near Violence

In many areas, arrests, violence, and near violence have accompanied the demonstrations. Recourse has been had to various municipal ordinances and state statutes in the wake of sit-ins. Public Officials invoked municipal ordinances prohibiting "disorderly conduct" in many cities, e.g., Atlanta, Nashville, and Richmond. *Atlanta Journal*, March 16, 1960, p. 1. "Breach of peace" charges were employed in Memphis. Violations of similar ordinances was relied upon in Marshall and Galveston, Texas, and various North Carolina cities. Upon conviction, fines were levied, generally in amounts under \$50. *Washington Post*, April 5, 1960, p. 1. A survey of this method of dealing with sit-ins may be

found in an article by Arthur Krock, New York Times, March 22, 1960.

The mounting wave of demonstrations and disturbances were not stilled by invocation of the mild fines levied in "disorderly conduct," "public disturbance," and "breach of peace" proceedings. Statutes, imposing more severe penalties, were brought to bear on the problem. These have been generally of two types: (1) Criminal trespass; and (2) conspiracy to interfere with trade and commerce. The trespass doctrine has been chosen in North Carolina, Georgia, and Virginia; refusal to leave the premises has been brought into play statutes making such action a "criminal trespass". In Nashville, there was invoked a state statute making illegal a conspiracy to commit "any act injurious to public health, public morals, trade, or commerce . . ." Tenn. Code Ann. § 39-1101 (7) (1956).

The law applicable to a particular sit-in incident varies greatly with the type of facility involved. For a county to segregate an eating place in its courthouse is a far different thing from a storekeeper's discrimination at his lunchcounter. Denial of service by a restaurant is legally distinguishable from refusal of service by a restaurant in a hotel. For precise analysis five categories of eating places must be noted and kept separate: (1) Government facilities; (2) eating facilities located in transportation terminals; (3) hotel facilities; (4) restaurants; and (5) lunch counters in stores.

Topics will be considered in the following sequence: (1) common, civil law; (2) common, statutory criminal law; (3) federal constitutional and statutory rights; and (4) summary of present state of law.

## II. Common Law (Civil)

There is an abundance of authority on the rights and duties of innkeepers and proprietors of restaurants as to accepting prospective guests. At common law a clear distinction existed between the obligations of an innkeeper and a restaurateur. Presumably well-settled rules remain controlling at present except in states which have enacted so-called "public accommodation" statutes.

An innkeeper is bound to receive and entertain all unobjectionable persons who present themselves as guests as long as he has available accommodations, and the prospective guests will pay for them. 29 Am. Jur. *Innkeepers* § 49 (1960). The following grounds for refusal of accommodations to prospective guests are generally recognized: (1) Inability to pay; (2) disorderly conduct; (3) no available space; and (4) drunkenness. See generally, Wyman, *Public Callings and The Trust Problem*, 17 Harv. L. Rev. 156, 217 (1903). The innkeeper's duty was not to discriminate arbitrarily against persons presenting themselves in a proper manner and at suitable times. An innkeeper's duty was imposed on grounds of public policy against one engaging in a public calling. One who thus held himself out as a servant of the public could not arbitrarily pick and choose his guests. Prosser, *Torts* 183 (2d ed. 1955); 43 C.J.S. *Innkeepers* § 9 (1945). It followed that a guest in the hotel could not be refused service in its eating facilities.

The fact alone that an eating place is part of a hotel will not prevent discrimination in such restaurant as to prospective patrons who are not also hotel guests. The rule of no discrimination in hotel facilities applies in favor of hotel patrons and no others. Note, *Private Remedies under State Equal Rights Statutes*, 44 Ill. L. Rev. 363, 364-77 (1949); *Opinion of the Justices*, 247 Mass. 589, 143 N.E. 808 (1924); *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888). Various Southern states have, however, abrogated this common law rule by statute, e.g., Del. Code Ann. tit. 24, § 1501 (1953); Tenn. Code Ann. § 62-710 (1955).<sup>1</sup>

### Restaurant Not an Inn

The legal definition of "inn" excludes "restaurants" from coverage under the above principles. "Inns" are places with lodging facilities. A proprietor of a restaurant has no common law duty to serve everyone who presents himself for service. In the absence of a statute, the restaurateur may accept some customers and reject others,

1. Tenn. Code Ann. § 62-710 (1956): "The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel or public house . . . shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel . . ."

even on racially discriminatory grounds. 2 Emerson & Haber, Political and Civil Rights in the United States 1405-1421 (2d ed. 1958). The above distinction between innkeeper and restaurant proprietor is made in a note in 46 Va. L. Rev. 123 (1960).

In *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P.2d 773 (1944), plaintiff brought an action for damages against the proprietor of a restaurant for his refusal to serve plaintiff. A Utah statute restated the common law duty of "innkeepers" to accept all patrons. The Supreme Court of Utah denied relief and held: (1) A "restaurant" is not an "inn" within the applicable statute; and (2) there is no common law duty on the part of restaurants to serve all comers. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E.2d 906 (1946), notes that one who operates a restaurant and hotel may have innkeeper duties to some guests and only those of a restaurateur to others. The Court of Appeals of New York announced similar rules in *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697 (1947), cert. den. 332 U.S. 761 (1947) at 72 N.E.2d 698:

At common law a person engaged in a public calling, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. . . . On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation . . . .

To the same effect is *State v. Clyburn*, 101 S.E.2d 295 (N.C. 1958), 3 Race Rel. L. Rep. 218 (1958). *Slack v. Atlantic White Tower System*, 181 F.Supp. 124 (D.Md. 1960), 5 Race Rel. L. Rep. 202 (1960), is in accord. An opinion of the Attorney General of Vermont in 1955 gives a concise review of the law in this area. 1 Race Rel. L. Rep. 802 (1956).

### Civil Trespass

A civil trespass consists of any entry of person or thing upon land in plaintiff's possession, or in remaining upon it, or allowing a thing to remain upon it, where there is a duty of removal.<sup>2</sup> Harper, Torts § 33 (1933). Every un-

authorized entry upon land of another was a civil trespass at common law. In England liability in tort was imposed for invasion of property even though unintended or negligent. This rule of strict liability, now repudiated in England, is meeting with increasing disfavor in American courts. Prosser, Torts § 13 (1955).

The Restatement of Torts now finds tort liability for trespass in three situations: (1) Intentional intrusion; (2) negligent intrusion; and (3) "extra-hazardous activity." Restatement, Torts § 166 (1934). Prosser believes it possible that the Restatement position will eventually prevail over the strict liability rule in American jurisdictions. Prosser, Torts § 13 (1955).

A civil trespass may also arise where one remains on land after a right of entry was terminated. One who refuses to leave after his license to remain has been revoked or has expired is guilty of civil trespass. Prosser, Torts § 13 (1955). Consent is a defense to a trespass action, but "[a] consent given by a possessor of land to the actor's presence on a part thereof does not create a privilege to enter or remain on any other part." Restatement, Torts § 169 (1934). The comment on section 169 states that if the guest leaves the area which he was allowed to enter, he becomes a trespasser.<sup>3</sup> Dicta in *Baseball Pub. Co. v. Bruton*, 302 Mass. 54, 56, 18 N.E.2d 362, 364 (1938), supports the principle enunciated in section 169. A cogent discussion of breach of conditional privilege may be found in Harper, Torts § 61 (1933). The basic principle here is that a restricted consent to enter land creates a privilege to do so only in so far as the condition is complied with. *Schiffman v. Hickey*, 101 Ore. 596, 200 Pac. 1035 (1921); *Bennett v. McIntire*, 121 Ind. 231, 23 N.E. 78 (1889); Restatement, Torts § 168 (1934).

A facet of the law of civil trespass relevant to sit-ins is the doctrine of "trespass ab initio." By this legal fiction an action of trespass was held to lie even though the original entry was not wrongful. Salmond, Torts 222 (8th ed. 1934). If one enters land lawfully and then subsequent-

to remain thereon a thing which the actor or his predecessor in legal interest brought thereon . . . is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests."

3. Restatement, Torts § 169, illustration 1 (1934): "A gives B permission to enter A's kitchen and leave a bottle of milk. B enters the kitchen, leaves the milk on the kitchen table and then enters A's bedroom. B's entry into the bedroom is a trespass on A's land."

2. Restatement, Torts § 158 (1934): "One who intentionally and without a consensual or other privilege (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or (b) remains thereon, or (c) permits



ly is guilty of tortious conduct, the abuse of authority relates back to the time of the original entry, and such person is said to have trespassed from the original entry. Prosser, Torts § 25 (2d ed. 1955). The fiction has been severely condemned by eminent writers in the field. Smith, *Surviving Fictions*, 27 Yale L. J. 147, 164 (1918); Bohlen and Shulman, *Effect of Subsequent Misconduct upon a Lawful Arrest*, 28 Colum. L. Rev. 841 (1928). Nevertheless, this fiction retains considerable vitality today. Prosser, Torts § 25 (2d ed. 1955).

The rule received its most famous and complete enunciation in the *Six Carpenters Case*, 8 Co. Rep. 146a, 77 Eng. Rep. 695 (1610). Six carpenters entered an inn, drank a quart of wine, paid for it, then accepted and drank a second quart of wine and ate some bread but refused

to pay for them. The Court of the King's Bench held there was no trespass. Once a person has license at the original entry, he becomes a trespasser only through wrongful action, not by inaction. Clearly, the six carpenters were guilty of wrongful conduct by their refusal to pay. Yet, they had not committed an active misdeed, and hence no trespass *ab initio* was found.

Sit-inners desire to pay for what they hope to get. Under the rule of this case and subsequent similar precedents, might it not be argued cogently that sit-inners are not guilty of such a trespass? Lunch counters are situated in stores offering a variety of goods for sale. Demonstrators are invited to buy such merchandise. *Quaere*: Can they be considered trespassers *ab initio* by sitting down at forbidden lunch counters?

### III. Common & Statutory Criminal Law

#### A. Criminal Trespass

Turning to "criminal" trespass, it must be understood that not every "civil" offense of this nature meets the additional requisites of the criminal law. Violence, coercion, and intimidation are generally thought necessary. Either the entry must be gained by such methods or detention of the property must be had by these modes. Perkins, *Criminal Law* 350-351 (1957) declares:

To walk across another's land, or to enter his building, without privilege, is a trespass, but this in itself, while a civil wrong, is not a crime. However, if an entry upon real estate is accomplished by violence or intimidation, or if such methods are employed for detention after a peaceable entry, there is a crime according to English law, known as forcible entry and detainer. This was a common-law offense in England, although supplemented by English statutes that are old enough to be common law in this country.

At common law, then, every civil trespass is not indictable as a criminal trespass. Generally, an invasion of private property unaccompanied by disturbance of the peace is not criminal. Even though the original entry be peaceable, criminal conduct may subsequently arise by unlawful detaining of property. *State v. Larason*, 143 N.E.2d 502 (C.P. Ohio 1956). Criminal in-

tent is a necessary element of the offense. There is no criminal trespass where one in good faith entered property mistakenly thought to be his own. Wilfulness and malice are usually required. *Johnston v. State*, 98 So.2d 445 (Miss. 1957). Adequate discussion of the necessary elements may be found in Miller, *Criminal Law* § 169 (1934).

Especially instructive in pulling or weaving together the tangled threads of this concept are the definitions of the Model Penal Code. In Model Penal Code § 221.2 (Tent. Draft No. 11, 1960), this definition of criminal trespass is given:

A person is guilty of criminal trespass if, without privilege to do so, he purposely enters or remains in:

- (a) any building or occupied structure, or separately secured or occupied portion thereof; or (b) any other place as to which notice against trespass is given. Notice may be given by posting in a manner prescribed by law or reasonably likely to come to the attention of intruders, as well as by actual communication to the actor.

In the rules promulgated in this Code the common thread of the offense is the idea of intrusion. One intrudes by entering or remaining without the consent of the occupant. Criminal penalties may be imposed in a proper situation

even though the intruder did no physical harm to the invaded property. Under the present law any of the following situations result in liability for criminal trespass: (1) The trespasser enters with the intent to take or to destroy property on the land; (2) forceful entry or forceful detainer, especially where he had been previously ejected; (3) trespass into a building rather than upon unenclosed land; and (4) entry after warnings have been posted against trespass. Model Penal Code § 206.53-206.54, comment (Tent. Draft No. 2, 1954).

#### Current Statutes

Turning to statutes at present in force in many states, under the broad category of "criminal trespass" statutes, may be found enactments declaring it to be a misdemeanor to enter upon the premises of another without the owner's permission. An example of such a statute is N.C. Gen. Stat. § 14-134 (1953).<sup>4</sup> In the same state a corollary statute, providing for "entry . . . in a peaceable and easy manner . . ." is N.C. Gen. Stat. § 14-126 (1953).<sup>5</sup> Analogous legislation was approved by the Governor of Virginia in February, 1960.<sup>6</sup> Ordinance No. 10-60 of the City of Montgomery, Alabama, approved in March, 1960, is virtually identical with the above statutes. Chapter 98 of the 1960 Acts of the General Assembly of Virginia, approved by the governor on February 25, 1960, makes it unlawful "to solicit, urge, encourage, exhort, instigate or procure another or others to go upon or remain upon the lands, buildings, or premises of another . . . knowing such other person

or persons to have been forbidden . . . to do so by the owner, lessee, custodian or other person lawfully in charge thereof." Chapter 99 of the 1960 Acts of the General Assembly of Virginia makes unlawful any "conspiracy" to so trespass.<sup>7</sup> Similar legislation has been enacted in Georgia. Atlanta Journal, April 7, 1960, p. 1. Other analogous legislation, though slightly dissimilar, should be here mentioned. Ordinance No. 11-60 of the City of Montgomery, Alabama, approved March, 1960, makes it unlawful "for any person . . . to disturb the peace of others by violent, profane, indecent, offensive or boisterous conduct or language, or by conduct calculated to provoke a breach of the peace." Ordinance No. 12-60 of the City of Montgomery, Alabama, approved March, 1960, makes it unlawful to promote, organize or hold a parade or procession without obtaining a permit, and sets up procedures and criteria for the issuance of such permits.

Officials in North Carolina, Georgia, and Virginia have currently preferred charges under the above statutes. Only two cases have thus far been reported under such legislation. In *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295, 3 Race Rel. L. Rep. 218 (1958), defendant Negroes entered the section of an ice cream parlor set aside for whites. The building had separate doors marked "White" and "Colored"; it was partitioned into two portions to separate the races. Negroes requested service in the area set aside for whites; it was refused and the manager asked defendants to leave. They declined to leave. Defendants were arrested and convicted of criminal trespass under N. C. Gen. Stat. § 14-134 (1953), *supra*. Their conviction was unanimously affirmed by the Supreme Court of North Carolina. This decision was not appealed to the Supreme Court of the United States. The state of North Carolina successfully argued the following propositions to justify their use of the criminal trespass statute: (1) Owner of premises may

4. N.C. Gen. Stat. § 14-134 (1953): "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days . . ."

5. N.C. Gen. Stat. § 14-126 (1953): "No one shall make entry into any lands and tenements . . . but in case where entry is given by law and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

6. Va. Code Ann. § 18-225 (1960): "If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be guilty of a misdemeanor . . ."

7. Va. Code Ann. § 18-7.1 (1960): "If any person shall conspire, confederate or combine with another or others in this State to go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, having knowledge that any of them have been forbidden, either orally or in writing, to do so by the owner, lessee, custodian or other person lawfully in charge thereof, or having knowledge that any of them have been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may reasonably be seen, he shall be deemed guilty of a misdemeanor . . ."

accept or reject anyone on his premises for whatever reasons he chooses; (2) operators of private businesses have a right to select their clientele on a racial basis, which right has been frequently recognized by American courts; (3) discrimination practiced here is only private action and not constitutionally prohibited state action; and (4) a proprietor's right to discriminate is not affected by the fact that restaurant was licensed by the state. The "state action" issue raised here will be considered, *infra*.

Criminal trespass charges were also brought in *Boynton v. Commonwealth*, 4 Race Rel. L. Rep. 1012 (1960). A Negro interstate bus passenger refused to leave a terminal restaurant where he had sought refreshment during a scheduled stop in the course of an interstate journey. He was convicted in a Richmond municipal court on the charge of "trespass upon the premises" and was fined \$10 for violation of a Virginia statute making it unlawful to remain "without authority of law" upon premises of another after being forbidden to do so. The Virginia Supreme Court of Appeals affirmed the conviction. The memorandum opinion is silent on the arguments for or against conviction. The theory of *Boynton* must, however, have proceeded on the lines of *Clyburn*, *supra*, i.e., there existed no right to be served, the "guest" refused to leave upon request, and hence was guilty of criminal trespass. Certiorari was granted by the United States Supreme Court in *Boynton* on February 23, 1960. 28 L.W. 3245 (1960); 4 Race Rel. L. Rep. 849 (1960). The apparent defense of this segregation being a burden on interstate commerce, posed in *Boynton*, will be discussed *infra*.

### B. Owner's Control of Premises Statutes

Act 14 of the 1959 Session of the Arkansas General Assembly makes it unlawful for any person to refuse to leave the business premises of any person when requested by the owner or manager, and makes it unlawful to encourage violation of the act. 4 Race Rel. L. Rep. 777 (1959). Act 497 of the 1960 session of the Georgia General Assembly, approved by the Governor February 18, 1960, makes it a misdemeanor to refuse to leave the premises of another when requested to do so by the owner or the person in

charge.<sup>8</sup> Florida has a similar statute. Fla. Stats. Ann. § 509.141 (1959 Supp.).

### C. Conspiracy To Interfere With Trade and Commerce

In Nashville, Tennessee, during February and March, 1960, a major effort by Negroes to obtain service at eating facilities in seven variety and drug stores as well as two bus terminals was met with unanimous refusal and 143 arrests. The students sat down at the lunch counter in each store and asked for service. After refusal of service, lunch counters were closed. Upon request to leave and refusal to do so, arrests followed. Westfeldt, *A Report on Nashville*, Nashville Community Relations Conference 1-2 (1960).

On March 2, 1960, seventy-nine participants were arrested on charges of unlawful conspiracy to commit acts injurious to public trade and commerce. Westfeldt, *A Report on Nashville*, Nashville Community Relations Conference 3-4 (1960). Tenn. Code Ann. § 39-1101 (7) (1956) is a very broad, indefinite provision striking at conspiracies "to commit any act injurious to . . . trade, or commerce . . ." Conviction of violation of Section 39-1101 (7) (1956) is by § 39-1103 (1956) made a misdemeanor. By Section 39-105 (1956), punishment is affixed at imprisonment for not more than one year or by fine not exceeding \$1000, or both.

Nashville prosecutors contended that the owner of a business inviting customers from the general public into his store has the right to deny the colored part of that public access to the eating facilities within the store. Nashville officials point to Section 39-1101 (7) as grounds for punishing conspiracy to interfere with this right of an owner to control his premises. Precedent illuminating this statute is virtually non-existent.

8. Ga. Code Ann. § 28-3005 (Supp. 1960) "It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

9. Tenn. Code Ann. 39-1101 (1956): "The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce, or for the perversion or obstruction of justice, or the due administration of the law."

Only one case even mentions the seventh section of § 39-1101. *State v. Smith*, 197 Tenn. 350 (1954), involved an indictment for conspiracy containing eight counts; the second count of that indictment charged a conspiracy "to commit any act injurious to public health, public morals, trade, or commerce. . . ." The second count, of course, is the section invoked by Nashville authorities. *Smith* is not at all helpful in explaining the nature of a conspiracy to interfere with commerce, for this case is completely silent on the substantive requisites of such a conspiracy. *Smith* concerned disturbances and concerted violence during a strike by a labor union—a totally dissimilar factual situation. Hence, we are left without precedent or illumination as to the requirements under this section. This statute is predicated upon acts "injurious" to trade. Therefore, a line of defense by sit-inners seems quite apparent. Defendants contend they did not stage these demonstrations to disrupt business but rather to increase it. Benefit, not injury, was intended. They argue they sat at lunch counters to buy food, not to stop any other customers from buying it. This defense seems plausible, but the content of Section 39-1101 (7) will depend entirely on the court's interpretation. Late reports indicate that all of the pending Nashville prosecutions have been dropped.

#### D. "Public Accommodation" Statutes

Such statutes guarantee all persons full and equal enjoyment of the advantages, facilities, and accommodations of certain enumerated business establishments. Discrimination based on race, color, or creed is forbidden. Generally,

such acts include the following places: inns, hotels, theaters, restaurants, common carriers, barbershops, and other places of public amusement and accommodation. 2 Emerson & Haber, *Political and Civil Rights in the United States* 1408-1413 (2d ed. 1958).

While sanctions and penalties enumerated by the statutes are far from uniform, violations are generally labelled misdemeanors. Fines and imprisonment are within the discretion of the court. Maximum fines are \$1000; maximum imprisonment is up to one year. Several states additionally allow civil damage actions to aggrieved persons, e.g., Michigan and New York. Konvitz, *The Constitution and Civil Rights* 109-44 (1947).

Such statutes have invariably withstood attacks upon their constitutionality under both federal and state constitutions. *Pickett v. Kuchan*, 323 Ill. 138, 153 N.E. 667 (1926). Among the relevant enactments are: Cal. Civ. Code § 51; Colo. Rev. Stat. Ann. § 25-1-7; Conn. Gen. Laws § 8375; Ill. Ann. Stat. c. 38, § 125; Ind. Ann. Stat. §§ 10-901-902; Iowa Code Ann. §§ 735.1, 735.2; Kan. Gen. Laws § 21-2424; Mass. Ann. Laws c. 272, §§ 92A, 98; Mich. Comp. Laws. § 28.343; Minn. Stat. § 327.09; Neb. Rev. Stat. § 20-101; N.J. Stat. Ann. § 18-25-4; (Supp. 1959) N.Y. Civil Rights Law § 40; Ohio Rev. Code Ann. § 12940; Pa. Stat. Ann. § tit. 184654; R.I. Gen. Laws, Ann. 1938, Ch. 606, § 28, 29 606:28, 29; Wash. Rev. Code § 2686; Wis. Stat. § 340-75; Ore. Rev. Stat. § 30.670, as amended by L. 1957, ch. 724 and § 30.675, are very typical of this sort of legislation. A collection of all such statutes may be found in Greenberg, *Race Relations and American Law* 375-78 (1959). Greenberg lists and summarizes twenty-seven state statutes.

## IV. Federal Constitutional or Statutory Rights

### A. Governmental Facilities

In *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court, of course, held that in the area of public education the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), had no place. The unconstitutionality of compulsory racial segregation in public school facilities has been deemed applicable to racial barriers in other governmental facilities. 2 Emerson &

Haber, *Political and Civil Rights in the United States* 1419-1422 (2d ed. 1958).

The rule of *Brown* was applied to restaurants in public buildings in *Plummer v. Case*, 1 Race Rel. L. Rep. 532 (S.D. Tex. 1955), 240 F.2d 922, 2 Race Rel. L. Rep. 117 (5th Cir. 1956). Negroes in Harris County, Texas, brought an action in federal district court seeking to restrain county officials and the lessee of a restaurant operated in the county court house from denying service in the restaurant to Negroes. County officials



defended on the ground that the restaurant was leased to a private individual for operation, and that the lessee could legally restrict his service to whomever he chose. The district court held that the county, having undertaken to furnish eating facilities, must afford substantially equal facilities for all persons regardless of race or color, pursuant to the equal protection clause of the 14th Amendment. The lessee's operation of the restaurant was governmental action, and the lessee had a similar duty not to exclude Negroes from the restaurant solely on the basis of race or color. On appeal the Court of Appeals, Fifth Circuit, affirmed. It held that the action of the lessee in operating the restaurant was as much "state action" as if the county itself were the operator and hence within the purview of the 14th Amendment.

The following cases have applied similar principles to other governmental facilities: (1) *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 356, 1 Race Rel. L. Rep. 162 (4th Cir. 1955), *aff'd per curiam*, 350 U.S. 887 (1955) (segregation enjoined in Baltimore parks); (2) *Simkins v. City of Greensboro*, 149 F.Supp. 562 (M.D.N.C., 1957), *aff'd* 246 F.2d 425, 2 Race Rel. L. Rep. 817 (4th Cir. 1957) (lessee may not segregate golf course); (3) *City of St. Petersburg v. Alsum*, 238 F.2d 830 (5th Cir. 1956), *cert. den.* 353 U.S. 922 (1956) (municipal beaches to be desegregated).

## B. Right To Be Served

Negro defendants bottom their argument upon the proposition that the owner of a private business, having once invited the general public into his place of business, may not then deny them the right of access to food facilities therein. This is distinct from the matter of possible constitutional right to be free from the operation of state laws which compel refusal of service or which provide criminal punishment for seeking service.

Only one decision has been found which lends direct support for claimed constitutional right to service after invitation into the premises. This is *Marsh v. Alabama*, 326 U.S. 501 (1946). It concerned the rights of owners to prevent the distribution of religious literature within the limits of a company-owned town in Alabama. It was there held that a state cannot, consistent with the freedom of religion and press guaranteed by the First and Fourteenth Amendments,

inflict criminal punishment on a person for distributing religious literature on the sidewalks in a company-owned town. Contrary regulations of the town's management cannot prevail where the town and its shopping areas are freely accessible to and freely used by the general public. The punishment cannot be levied even under a state statute making it criminal for anyone to enter or remain on the premises of another following warning not to do so.

*Marsh* is relevant to the present controversy in that part of the decision contained language to the effect that an operator of a privately owned business becomes bound by the statutory and constitutional rights of individuals to the degree he invites the general public as customers for private gain. The following passage in 326 U.S. at 506 ought especially to be noted:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . [the] owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.

As can be seen from this language, it is rather debatable whether stores, restaurants and the like fall within the category of public facilities cited by Mr. Justice Black. Recent events in a Raleigh, North Carolina, shopping center strengthen the argument of *Marsh* insofar as use of sidewalks goes. There, forty-three Negro student demonstrators were arrested on the sidewalk in a privately owned shopping center while attempting to stage a lunchcounter demonstration in a Woolworth store. These charges were subsequently dismissed; the court commented that insofar as the sidewalks went, no argument existed against them. *Marsh, supra*, was cited as controlling. Washington Post, April 23, 1960.

In *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959), 4 Race Rel. L. Rep. 713 (1959), Sections 1 and 2 of the Civil Rights Act of 1875 were cited by the Negro plaintiffs as conferring upon them the right to be served in restaurants and such places. This act did so

provide, and it further gave a civil action for damages in the sum of \$500 to one whose rights were violated. Circuit Judge Soper rejected this argument in view of the holding in the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), that these sections of the Act were unconstitutional, in that the Fourteenth Amendment dealt with state action alone and not private action.

In *Valle v. Stengel*, 176 F.2d 697 (3rd Cir. 1949), the manager of a privately owned swimming pool in New Jersey, aided by city police, denied entrance to the pool to Negroes, citizens of New York. A suit for damages and injunction on the ground that the action of the police established requisite state action and that plaintiffs had been denied the right to enter a contract (purchase of admission tickets) was upheld by the Court of Appeals. N.J. Rev. Stat. § 10:1-2 (1937) gave all persons, irrespective of color, the right to admission into such a place of public accommodation. Since all citizens of New Jersey had such a right, any citizen of the United States was equally vested with this right under Article IV, Section 2 and under the equal protection clause of the Fourteenth Amendment. The key to *Valle* was the existence of a public accommodation statute in New Jersey. Despite the use in the first part of the opinion of somewhat broader language, the court in 176 F.2d at 703-704 seems clearly to limit its holding to the public accommodation state situation.

### C. State Action

The Supreme Court of the United States said in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 1161 (1947), at 334 U.S. 13:

Since the decision of this Court in the *Civil Rights Cases* . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

The concept of "state action" furnishes the next constitutional argument of Negro defendants. It is their contention that, even conceding that the authorities at present recognize no constitutional right to be served against the owner's wishes, the states in these various criminal

charges are engaged in state action enforcing private discrimination. This, it is said, violates the equal protection clause of the Fourteenth Amendment. For this proposition *Shelley v. Kraemer*, *supra*, is cited.

*Shelley* held that private agreements to exclude persons of designated races from the use or occupancy of residential property do not violate the equal protection clause of the Fourteenth Amendment. Yet, the actions of state courts and judicial officers in enforcing these covenants are "state actions" within the purview of the Fourteenth Amendment. Therefore, in granting judicial enforcement of such private agreements, the states deny equal protection of the law. Such restrictive covenants are enforceable between the contracting parties; state courts may not lend their sanctions to them.

Participants in sit-ins point to two supposed "state actions" in the present controversy: (1) The state's issuance of operating licenses to the discriminating restaurants; and (2) enforcement of criminal sanctions by state and municipal officials. "The . . . problem is to determine at what point apparently private acts become state action through court enforcement or other implementation of state authority." 11 Okla. L. Rev. 437, 438 (1958).

As to state action in licensing of restaurants, there may be sufficient causal relation via the license between the licensor—state—and the licensee—restaurant—the perpetrator of the discrimination, due to the likelihood in Southern states that discrimination will be committed by the licensee. 57 Mich. L. Rev. 122, 123 (1958). This rather tenuous argument has met with no favor where propounded. Authorities have unanimously found no state action in the issuance of an operator's license by the state. In *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959), 4 Race Rel. L. Rep. 713 (1959), the United States Court of Appeals for the Fourth Circuit rejected the argument as follows at 847-848:

The license laws of Virginia do not fill the void [lack of state action]. [The Virginia statute] makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner . . . The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate

what persons shall be served. The customs of the people of a state do not constitute state action . . . .

To the same effect is *State v. Clyburn*, 101 S.E.2d 295 (1958), 3 Race Rel. L. Rep. 218 (1958). *Slack v. Atlantic White Tower System*, 181 F.Supp. 124 (D.Md. 1960), 5 Race Rel. L. Rep. 202 (1960), *supra*, is in accord.

#### [Enforcement by Officials]

Assuming the particular sit-in incident involves arrest and court proceedings, we come to the second supposed instance of state action, i.e., enforcement by state and municipal officials of criminal sanctions. Enforcement of criminal sanctions by the state to buttress private discrimination does constitute state action in fact. An analogy may be drawn to the intervention of the courts to enforce private agreements condemned in *Shelley*, *supra*. 57 Mich. L. Rev. 122, 124 (1958). However, "[t]he present state of the law not only recognizes that 'a man's home is his castle,' but allows the state to police his gate and coercively enforce his racial discrimination." 57 Mich. L. Rev. 122, 125 (1958). A note, *Racial Discrimination by Restaurant*, 46 Va. L. Rev. 123 (1960), points out that "state action" by the courts violates no constitutional right here, for there is no right to be served known to the law at present. An instructive reference article may be found in 1 Race Rel. L. Rep. 613 (1956).

In *State v. Clyburn*, 101 S.E.2d 295, 3 Race Rel. L. Rep. 218 (1958), it was argued by the Negro defendants that "state action" existed in the enforcement by the North Carolina courts and police officials of a "criminal trespass" statute through which private discrimination was effectuated. This contention was rejected. No "state action" was discernible in the enforcement of such a statute. Private conduct alone constituted the discrimination; the Fourteenth Amendment creates no barrier against merely private conduct. *Clyburn* was discussed with approval in 9 Mercer L. Rev. 364 (1958); it was suggested therein that to find state action in enforcement of a nondiscriminatory statute involved a step that the United States Supreme Court seemed yet unwilling to take.

*Valle v. Stengel*, 176 F.2d 697 (3rd Cir. 1949), found state action in the conduct of borough police in enforcing the private discrimination of a swimming pool operator. Following the rule in *Screws v. United States*, 325 U.S. 91 (1945),

the police were acting under "color of law" in arresting the Negroes, even though the discrimination was patently contrary to N.J. Rev. Stat. § 10:1-2 (1937). New Jersey has a public accommodation law. Plaintiffs had a legally recognized right to be admitted. Hence, in *Valle*, the police activity did violate a constitutionally protected right.

In the realm of transportation and terminal facilities the rule of the *Brown* case, *supra*, has been held applicable. Injunctions have been granted against officials, bus companies and their employees restraining the enforcement of statutes and local ordinances requiring segregation on intrastate carriers. *Emerson & Haber, Political and Civil Rights In The United States* 1404 (2d ed. 1958). Where state public service commissioners and city officers were acting as agents of the state in enforcing orders and custom or policy of racial segregation in railway waiting rooms, requisite state action under the Fourteenth Amendment existed. *Baldwin v. Morgan*, 251 F.2d 780, 3 Race Rel. L. Rep. 318 (5th Cir. 1958). Similarly, state action so as to invoke *Brown* was found in *Henry v. Greenville Airport Commission*, U.S. Ct. App., 4th Cir., No. 8000, 5 Race Rel. L. Rep. 453 (1960). A Negro plaintiff was discriminatorily excluded from the general waiting room in the Greenville airport and directed to a separate colored waiting room. The state legislature had created an airport commission and delegated to it authority to promulgate airport rules. The commission had issued the segregation order. The airport commission's exercise of its delegated powers constituted "state action."

#### D. Interstate Commerce Clause

The commerce clause undoubtedly permits Congress to regulate racial discrimination in restaurants. Congress has not seen fit to do so thus far. See *NAACP v. St. Louis, San Francisco Railway Co.* (Interstate Commerce Commission, 1955) 1 Race Rel. L. Rep. 263, (1956). The Commerce Clause also operates directly through its own force as a restrictive power over state and local interference with the free flow of interstate commerce. Whether local regulation burdens interstate commerce is decided upon the characterization of the subject matter regulated, i.e., either as matters local in nature, or calling for a single uniform Congressional rule. It seems well settled that the commerce clause

prohibits racial segregation by public carriers engaged in interstate commerce whether they act on the basis of state law or their own rule. *Morgan v. Virginia*, 328 U.S. 373 (1946). Hence, where sit-ins have occurred in interstate bus terminals, airline terminals, and restaurants on interstate highways, it is arguable that a right to be served exists by virtue of national uniformity required by the commerce clause. Defendants contend, where some interstate commerce link is present, that restaurants must be treated just as interstate carriers; defendants urge the courts to hold unimportant the factual distinction between carriers moving interstate with conflicting local rules and a local retail establishment.

Three recent cases were such factually as to raise this argument—a municipal air terminal restaurant, an eating place on an interstate highway, and a restaurant in an interstate bus terminal. In two of these cases the interstate commerce contention was in fact made. *Coke v. City of Atlanta*, 5 Race Rel. L. Rep. 138 (N.D. Ga. 1960), held that refusal to serve a Negro traveller on the same basis as whites in a privately-leased restaurant in Atlanta Municipal Airport was a denial of equal protection of the laws. Plaintiff argued that since the restaurant was conducted in conjunction with an interstate airline terminal that the discrimination was a prohibited burden on interstate commerce. The court did not, however, pass on the interstate commerce argument, resting its decision on the equal protection clause.

*Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 4 Race Rel. L. Rep. 713 (4th Cir. 1959), was a class action brought by a Negro against a restaurant in Virginia, seeking a declaratory judgment that refusal to serve him because of race violated, *inter alia*, the commerce clause. It was alleged that the defendant restaurant was engaged in interstate commerce because it was located beside an interstate highway and served interstate travelers. The cases cited in support of this argument all involved discrimination by carriers engaged in the transportation of passengers in interstate commerce. Discriminatory action by carriers violated 49 U.S.C. § 3(1); no such statute was present as to restaurants as noted, *supra*. In rejecting the plaintiff's commerce clause theory, it was said in 268 F.2d at 848:

[W]e do not find that a restaurant is engaged in interstate commerce merely be-

cause in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select.

A case comment in 5 Vill. L. Rev. 301 (1959) is sharply critical of the commerce clause decision in this case. The rationale of this comment is as follows: (1) Plaintiff was engaged in interstate commerce; (2) such travellers need food; (3) refusal to serve plaintiff solely on racial grounds places an undue burden on interstate commerce. Defendant, it is said therein, burdened interstate commerce by his discrimination even though not subject to the Interstate Commerce Act. The writer of the comment indicates that necessarily the case would be clearer if defendant had been an interstate carrier. He is of opinion that the attitude of the Supreme Court is that any racial discrimination is unreasonable and thereby places an undue burden on interstate commerce.

Finally, *Boynton v. Commonwealth*, 4 Race Rel. L. Rep. 1012 (Va. 1959), concerned a Negro interstate bus passenger and refusal of service in a terminal restaurant during a regularly scheduled stop in the course of an interstate journey. The Supreme Court of Appeals of Virginia affirmed conviction of violation of a criminal trespass statute. The memorandum opinion is silent on the interstate commerce clause aspects of the case—which seems factually a possible defense. The Supreme Court of the United States has granted certiorari. 28 L.W. 3245, 4 Race Rel. L. Rep. 849 (1960). One may rather safely predict that more will be heard of the interstate commerce clause in *Boynton*. Should the arrests made in Nashville bus terminals proceed to trial, it seems likely that such an argument may also be made therein.

Where service is refused or tendered on a segregated basis in a terminal facility, it has been seen, *supra*, that the rule of *Brown* has had the effect of making illegal such discrimination. Segregation in railroad waiting rooms was condemned under the Fourteenth Amendment in *Baldwin v. Morgan*, 251 F.2d 780, 3 Race Rel. L. Rep. 318 (5th Cir. 1958). Such discriminatory treatment was also forbidden in airport waiting rooms in *Henry v. Greenville Airport Commis-*



sion, U.S. Ct. Apps., 4th Cir., No. 8000, 5 Race Rel. L. Rep. 453 (1960). Segregated seating in intrastate bus transportation has been struck down in *Browder v. Gayle*, 142 F.Supp. 707, 1 Race Rel. L. Rep. 689 (M.D. Ala., 1956), aff'd

per curiam 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956). These cases have been decided under the equal protection clause-state action rationale. They are not authorities for commerce clause theories.

## V. Summary of Present State of Law

At common law an innkeeper was, as we have seen in Section II, *supra*, under a duty to receive all persons who properly applied and were willing and able to pay reasonable compensation for available accommodations. *Bowlin v. Lyon*, 67 Iowa 536, 25 N.W. 766 (1885); *Jackson v. Virginia Hot Springs Co.*, 213 Fed. 969 (4th Cir. 1914). This common law duty has been confined to hotels and places with lodgings; restaurants have been entirely excluded from the duty. *Armwood v. Francis*, 9 Utah 2d 147, 340 P.2d 88, 4 Race Rel. L. Rep. 709 (1959); Note, *Racial Discrimination by Restaurant*, 46 Va. L. Rev. 123, 124 (1960). The courts of this country have repeatedly recognized the common law right of an operator of a restaurant and similar places to select clientele on a color basis. *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697 (1947); *Terrell Wells Swimming Pool v. Rodriguez*, (Tex. Civ. App. 1944) 182 S.W.2d 824; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909). Case comments in these law reviews sustain this rule: 9 Mercer L. Rev. 364 (1958); 37 N.C.L. Rev. 75 (1958); and 11 Okla. L. Rev. 437 (1958). The situation is, of course, entirely different in those states which prohibit such discrimination in restaurants and like places through constitutional and statutory provisions. Examples of such provisions are N.Y. Const. art. I, § 11 and Wash. Rev. Code § 49.60.010 (Supp. 1958). These so-called "public accommodation" statutes do not infringe the proprietor's constitutional rights. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). Such statutes are unavailable to Negroes in the current controversy, for they are not found in Southern states.

Sit-in participants can find one decision lending some support to a right to be served. *Marsh v. Alabama*, 326 U.S. 501 (1946), does contain some dicta to the effect that the operator of a privately owned business becomes bound by the statutory and constitutional rights of individuals to the extent that he invites the

general public as customers for his private gain. The language was not necessary to the decision. *Marsh* involved a dissimilar factual situation. At best, it might be applicable to stores inviting Negroes into all sections but eating facilities. It would seem to have no application to a private establishment dealing wholly in food sales and not issuing any invitation at all if the decision is restricted to its facts.

### Role of 14th Amendment

It is clear that the Fourteenth Amendment has no operation on purely private discrimination. *Civil Rights Cases*, 109 U.S. 3 (1883). *Shelley v. Kraemer*, 334 U.S. 1 (1948), makes evident the principle that the action prohibited by the Fourteenth Amendment is that of the states. Negro defendants, relying upon the rule in *Shelley*, argue that state action may be found in state licensing of discriminatory restaurants and court enforcement of such private discrimination. *State v. Clyburn*, 101 S.E.2d 295, 3 Race Rel. L. Rep. 218 (1958), emphatically rejected this argument; neither supposed state link was found sufficient. See 57 Mich. L. Rev. 122 (1958) and 37 N.C.L. Rev. 73 (1958). *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 4 Race Rel. L. Rep. 713 (4th Cir. 1959), found no state action in Virginia's issuance of an operator's license to a restaurant. It has been suggested that even if state action should be found here, still no constitutional violation is present, for no constitutional right to be served exists, and hence nothing has been infringed by the state action. 46 Va. L. Rev. 123, 127 (1960).

Another possible defense to sit-in prosecutions arises where the eating facility is connected with a terminal of an interstate carrier. *Morgan v. Virginia*, 328 U.S. 373 (1946), tells us that the commerce clause forbids racial segregation by public carriers engaged in interstate commerce. Where the eating facility is merely in a carrier terminal, the law is not so clear. *Coke v. City of Atlanta*, 5 Race Rel. L. Rep. 138 (N.D.Ga. 1960),

raised the issue, but the case was not decided on that basis. *Williams v. Howard Johnson's Restaurant, supra*, found no such burden on interstate commerce where the discrimination was by a restaurant on an interstate highway against interstate motorists. *Boynton v. Commonwealth, supra*, presents a factual situation squarely raising the issue of undue burden on interstate commerce by such discrimination. The Virginia court did not refer to the issue. The Supreme Court has granted certiorari, and we

may expect a decision there on this point. Following the *Brown* decision, segregation has been repeatedly enjoined in intrastate transportation and in municipal terminals. Railway waiting rooms may not be segregated. *Baldwin v. Morgan*, 251 F.2d 780, 3 Race Rel. L. Rep. 318 (5th Cir. 1958). Airport waiting rooms may not be segregated. *Henry v. Greenville Airport Commission*, 5 Race Rel. L. Rep. 453 (4th Cir. 1960). These cases are placed on the equal protection-state action rationale.



# TABLE OF CASES

## Cumulative, 1960

IN THIS LISTING, the official style of each case in the three 1960 issues and its citation, if any, appear in *italic type*. The reverse citations are in Roman type. A complete table of cases for the first two volumes of RACE RELATIONS LAW REPORTER appears at 2 Race Rel. L. Rep. 1233; Volume 3: 3 Race Rel. L. Rep. 1301; Volume 4: 4 Race Rel. L. Rep. 1103.

<i>Aaron v Tucker</i> , USDC Ark, 186 F Supp 913	615	<i>Arnold; Seniors v</i>	791
<i>Airline Pilots Assn v Quesada</i> , USDC NY, 182 F Supp 595	749	<i>Arquette v Schneckloth</i> , Wash Sup Ct, 351 P2d 921	420
<i>Airline Stewards and Stewardesses Assn International v Transworld Airlines</i> , USDC NY 173 F Supp 369; USCA 2d Cir 273 F2d 69	129	<i>Art Builders Inc; Hackley v</i>	154
<i>Alabama St Bd of Ed; Dixon v</i>	723	<i>Association for Preservation of Freedom of Choice v Simon</i> , NY Co Sup Ct Spec Term, 201 NYS2d 135	808
<i>Alabama, State of; United States v</i>	301	<i>Association of Citizens Councils of Louisiana; U S v</i>	773
<i>Alexandria, Sch Bd of City of; Jones v</i>	81, 399	<i>Atlanta, City of; Coke v</i>	138
<i>Allen v County Sch Bd of Prince Edward Co Va</i> , USDC Va, April 22, 1960, Civ No 1333	412	<i>Atlanta, City of, Members Bd of Ed of; Calhoun v</i>	56, 374
<i>Allred et al v Heaton et al</i> , Tex Ct Civ App, 336 SW2d 251	730	<i>Augustus v Bd of Public Instr of Escambia Co Fla</i> , USDC Fla, 185 F Supp 450	645
<i>American Airlines Inc; Calva v</i>	216	<i>Aurora, City of; Egan v</i>	415
<i>American Jewish Congress v Carter</i> , NY Sup Ct App Div 1st Dept, 199 NYS2d 157	426	<i>Bailey v Henslee</i> , USCA 8th Cir, 264 F2d 744; USDC Ark, 184 F Supp 298	226, 846
<i>Anderson v State</i> , Ala Ct App, 120 So2d 397	490	<i>Banks v Capital Airlines</i> , NY SCAD No C-4542-57	263
<i>Angel v Louisiana State Bd of Ed</i> , USDC La, May 24, 1960, Civ No 1658	652	<i>Bates v City of Little Rock</i> , USSC, 80 S Ct 412	35
<i>Application of Lee</i> , NJ Super Ct, 161 A2d 759	765	<i>Bd of Ed of City of Knoxville; Goss v</i>	80, 670
<i>Application of Fisher</i> , NY Sup Ct, 194 NYS2d 772	174	<i>Bd of Ed of Harford Co; Pettit v</i>	379
<i>Appl'cation of NAACP</i> , Va St Corp Comn, No 14629	285	<i>Bd of Ed Laurel Spec Sch Dist v Shockley</i> , Del Sup Ct, 156 A2d 214	104
<i>Application of Yates</i> , Okla Ct Crim App, 349 P2d 45	112	<i>Bd of Funeral Directors &amp; Embalmers; Tenn Negro Funeral Directors Assn v</i>	416
		<i>Bd of Public Instr, Hillsborough Co; Mannings v</i>	370
		<i>Bd of Public Instr of Escambia Co Fla; Augustus v</i>	645



Bd of Public Instr Sumter Co Fla; Ferris v	367	<i>Carr v Young</i> , Ark Sup Ct, 331 SW2d 701	101
Beckett; Sch Bd of City of Norfolk v	404	Carter; American Jewish Congress v	426
<i>Beckett v. Sch Bd of City of Norfolk Va</i> , USDC Va, 181 F Supp 870	404	Central of Ga Ry Co; Williams v	129
Bennett; NAACP v	179	<i>Charley v Rhay</i> , Wash Sup Ct, 348 P2d 977	173
<i>Bernstein v Real Est Comn of Md</i> , Md Ct Appls, 156 A2d 657	153	City of Alexandria, Sch Bd of; Jones v	81
Birmingham Transit Co; Boman v	841	City of Atlanta; Coke v	138
<i>Boman v Birmingham Transit Co</i> , USCA 5th Cir, 280 F2d 531	841	City of Atlanta, Members of Bd of Ed of; Calhoun v	56
<i>Borders v Rippey</i> , USDC Tex, 184 F Supp 402	679	City of Aurora; Egan v	415
<i>Boson v Rippey</i> , USCA 5th Cir, 275 F2d 850	392	City of Creve Coeur, State ex rel v Wein- stein	207
<i>Boyd v Henslee</i> , USCA 8th Cir, 276 F2d 876	484	City of Louisville; Thompson v	7
<i>Braden v United States</i> , USCA 5th Cir, 272 F2d 653	176	<i>City of Montgomery, Ala v Gilmore</i> , USCA 5th Cir, 277 F2d 364	455
Brewer; United States v	807	City of New York; Martin v	803
Brooks; State (SC) v	232	City of Norfolk, Va; Reid v	142
Bryan; Crow v	423	<i>Coke v City of Atlanta</i> , USDC Ga, 184 F Supp 579	138
Bullock; State (SC) v	221	<i>Colorado Anti-Discrim Comn v Conti- nental Air Lines Inc</i> , Colo Sup Ct, 355 P2d 83	778
Burton; Wilmington Parking Auth v	194	Collins et al; Griffin et al v	825
Bush; Orleans Parish Sch Bd v	655	<i>Commission Against Discrim v Marshall</i> , Mass Comn Against Discrim, Aug 22, 1960, No PrH 11-9-C	928
<i>Bush v Orleans Parish Sch Bd</i> , USDC La, 187 F Supp 42	378, 655	<i>Commission on Human Relations v</i> <i>Studio Girl-Hollywood</i> , Phila Comn on Human Relations, March 7, 1960	546
<i>Byrd v Sexton et al</i> , USCA 8th Cir, 277 F2d 418	750	Committee on Offenses Against Admin- istration of Justice; NAACP v	817
<i>Calhoun v Latimer</i> , USDC Ga, Sept 13, 1960, Civ No 6298	650	<i>Commonwealth of Pennsylvania v G'b- ney</i> , Chester Co Ct Com Pleas, Aug 31, 1959, No 1395 in Equity	475
<i>Calhoun v Members of Bd of Ed, City of</i> <i>Atlanta</i> , USDC Ga, Civ No 6298	56, 374	Continental Air Lines Inc; Colo Anti- Discrim Comm v	778
California; Talley v	607	County Sch Bd of Grayson Co; Goins v	716
<i>Calva v American Airlines Inc.</i> , USDC Minn, 177 F Supp 238	216	<i>Crawford v Kent</i> , Mass Sup Jud Ct, 167 NE2d 620	830
<i>Camacho v Doe</i> , Bronx Co NY Sup Ct Spec Term Part I No 11884/58; NY Ct Appls, 7 NY2d 762; 194 NYS2d 33	775	<i>Crawford v Lydick</i> , USDC Mich, 179 F Supp 211	105
Capital Airlines; Banks v	263		

<i>Creve Coeur, City of, State ex rel v Weinstein</i>	207	<i>Federal Power Comm v Tuscarora Indian Nation, USSC, 80 S Ct 543</i>	16
<i>Crisp v Pulaski Co Sch Bd, USDC Va, April 26, 1960, Civ No 1052</i>	721	<i>Ferris v Bd of Public Instr of Sumter Co Fla, Fla Dist Ct of Appl 2d Dist, 119 So2d 389</i>	367
<i>Crow v Bryan, Ga Sup Ct, 113 So2d 104</i>	423	<i>Fischer, Application of</i>	174
<i>Davis v East Baton Rouge Parish Sch Bd, USDC La, Apr 28, May 24, 1960 Civ No 1662</i>	653	<i>Florida, Escambia Co Bd of Pub Instr of; Augustus v</i>	645
<i>Davis; Williams v</i>	655	<i>Florida Legislative Investig Comm v Gibson and Graham, Leon Co Fla Cir Ct, Aug 30, 1960, Nos 16820, 16821</i>	814
<i>DeFillo; United States v</i>	506	<i>Flournoy; Smith v</i>	117
<i>Dist Ct of Montezuma Co; Whyte v</i>	170	<i>Floyd Co Sch Bd; Walker v</i>	714
<i>Distillery, Rectifying, Wine and Allied Workers Internatl Union; Jones v</i>	786	<i>Ford; People of State of Illinois v</i>	853
<i>Div Against Discrim; Green Fields Farm Inc v</i>	160	<i>Foster v Warwick Hotel, Phila Comm on Human Rel, April 5, 1960, No 11-23-1847(59)</i>	538
<i>Div Against Discrim; Levitt &amp; Sons v</i>	160	<i>Gallion; NAACP v</i>	809
<i>Dixon v Alabama St Bd of Ed, USDC Ala, 186 F Supp 945</i>	723	<i>Galloway v Warden of Md Penitentiary, Md Ct Appls, 157 A2d 284</i>	231
<i>Doe; Camacho v</i>	775	<i>Gardner v Vic Tanny Compton Inc, Cal Dist Ct Appl, 2d Dist Div 3, 6 Cal Rptr 490</i>	831
<i>Dove; Parham v</i>	349	<i>Gibney; Commonwealth (Pa) v</i>	475
<i>Dove v Parham, USDC Ark, 176 F Supp 242; 181 F Supp 504; 183 F Supp 389; 232 F2d 256</i>	43, 349, 631	<i>Gibson, Graham; Florida Legislative Investig Comm</i>	814
<i>Drews; State (Md) v</i>	469	<i>Gilmore; City of Montgomery Ala v</i>	455
<i>Dunlap; State (NJ) v.</i>	854	<i>Glennon; Island Steamship Lines v</i>	108
<i>East Baton Rouge Parish Sch Bd; Davis v</i>	653	<i>Goins v Co Sch Bd of Grayson Co, USDC Va, 186 F Supp 753; USCA 4th Cir, 282 F2d 345</i>	716
<i>Egan v City of Aurora, USCA 7th Cir, 275 F2d 377</i>	415	<i>Goss v Bd of Ed of Knoxville, USDC Tenn, Feb 8, 1960, Civ No 3984; 186 F Supp 753</i>	80, 670
<i>Ennis; Evans v</i>	637	<i>Green Fields Farm Inc v Div Against Discrim, NJ Sup Ct, 158 A2d 177</i>	160
<i>Erickson v Sunset Memorial Park Assn, Hennepin Co Minn Dist Ct, No 541493</i>	186	<i>Greensboro City Bd of Ed; McCoy v</i>	75
<i>Evans v Ennis, USCA 3rd Cir, 281 F2d 385</i>	637	<i>Greensboro, City of; Tonkins v</i>	460
<i>Evans v Ross, NJ Super Ct, 157 A2d 362</i>	206	<i>Greenville Airport Comm; Henry v</i>	453
<i>Ex Parte NAACP, Ala Sup Ct, 122 So2d 396</i>	809	<i>Gremillion, State ex rel v NAACP</i>	467
<i>Fair Share Organization v Kroger Co, Ind Sup Ct, 165 NE2d 606</i>	426	<i>Griffin et al v Collins et al, USDC Md, 187 F Supp 149</i>	825
<i>Fass; State (NJ) v</i>	839		
<i>Fayette Co Democratic Exec Comm; United States v</i>	421		

<i>Hackley v Art Builders Inc.</i> , USDC Md, 179 F Supp 851	154	<i>In the Matter of Markey v Black and Marketime Drugs</i> , Wash St Bd Against Discrim, Jan 25, 1960, No E-575	917
<i>Haifetz v Rizzo</i> , USDC Pa, 178 F Supp 828	108	<i>In the Matter of Rhone and Case</i> , Colo Anti-Discrim Comn, May 12, 1960, No H-3	541
<i>Hall v St Helena Parish Sch Bd</i> , USDC La, Apr 28, May 24, 1960, Civ No 1068	654	<i>Island Steamship Lines v Glennon</i> , USDC Mass, 178 F Supp 292	108
<i>Handley; Matthews v</i>	106	<i>Jimmerson v Savoy Theater</i> , Mich FEPC, Aug 7, 1960, No 1068	914
<i>Hannah v Larche</i> , USSC, 80 S Ct 1502	303	<i>Johnson v MacCoy</i> , USCA 9th Cir, 278 F2d 37	750
<i>Harford Co Md Bd of Ed; Pettit v</i>	379	<i>Jones; Helmig v</i>	414
<i>Harris; People of California v</i>	762	<i>Jones v Distillery, Rectifying, Wine and Allied Workers Internatl Union</i> , USDC Ky, July 21, 1960, No 3984	786
<i>Harris County, Tex; Willie v</i>	146	<i>Jones v Marva Theatres, Inc</i> , USDC Md, 180 F Supp 49	151
<i>Hayes v Seaton</i> , USCA DC Cir, 271 F2d 414	169	<i>Jones v Sch Bd of City of Alexandria Va</i> , USDC Va, 179 F Supp 280; USCA 4th Cir, 278 F2d 72	81,399
<i>Heaton et al; Allred et al v</i>	730	<i>Kansas City, Mo; Marshall et al v</i>	834
<i>Helmig v Jones</i> , USCA 3rd Cir, 271 F2d 414	414	<i>Kasper v State</i> , Tenn Sup Ct, 333 SW2d 934	418
<i>Henry v Greenville Airport Comn</i> , USCA 4th Cir, 279 F2d 751	453	<i>Katzen; Trowbridge v</i>	837
<i>Henslee; Bailey v</i>	226,846	<i>Kennedy etc v Housing Auth of Savannah</i> , Chatham Co Ga Super Ct, Aug 16, 1960, No 2004	804
<i>Henslee; Boyd v</i>	484	<i>Kent; Crawford v</i>	830
<i>Henslee; Moore v</i>	484	<i>Knoxville, Bd of Ed of; Goss v</i>	80,670
<i>Highlander Folk Sch; State ex rel Sloan v</i>	91	<i>Kroger Co; Fair Share Organization v</i>	426
<i>Holy-Elk-Face et al; State (NDak) v</i>	808	<i>Larche v Hannah</i> , USSC, 80 S Ct 1502	303
<i>Housing Auth of Savannah; Kennedy etc v</i>	804	<i>Latimer; Calhoun v</i>	650
<i>Houston Independent Sch Dist v Ross</i> , USCA 5th Cir, 282 F2d 95	703	<i>Laurel Spec Sch Dist, Bd of Ed v Shockley</i>	104
<i>Howard Savings Institution of Newark v Trustees of Amherst College</i> , NJ Super Ct, Chancery Div, 160 A2d 177	387	<i>Lee; Application of</i>	765
<i>Hoyt v State</i> , Fla Sup Ct, 119 So2d 691	501	<i>Lenape Swim Club, In re</i>	475
<i>In re Dinkens</i> , USDC Ala, Aug 11, 1960, No 1619-N; USCA 5th Cir, Aug 24, 1960, No 18562	766	<i>Leon; Sweet v</i>	472
<i>In re Palmer</i> , USDC La, July 18, 1960, No 10 Sundry	774	<i>Levitt and Sons Inc v Div Against Discrim</i> , NJ Sup Ct, 158 A2d 177	160
<i>In re Lenape Swim Club</i> , Chester Co Pa Ct of Com Pls, July 31, 1959, Misc No 11559	475	<i>Little Rock, City of; Bates v</i>	35
<i>In re State ex rel Gallion; Ex parte NAACP</i>	809		

Louisiana St Bd of Ed; Angel v	652	NAACP; State ex rel Gremillion v	467
Louisville, City of; Thompson v	7	NAACP v Bennett, USDC Ark, 178 F Supp 191	179
Lydick; Crawford v	105	NAACP v Committee on Offenses Against Administration of Justice, Va Sup Ct Appls, 114 SE2d 721	817
MacCoy; Johnson v	750	NAACP v Gallion, USDC Ala, Aug 11, 1960, Civ No 1622-N	809
McConville; State (Idaho) v	230	Native American Church of North America v Navajo Tribal Council, USCA 10th Cir, 272 F2d 131	109
McCoy v Greensboro City Bd of Ed, USDC NC, 179 F Supp 745	75	Navajo Tribal Council; Native American Church v	109
McDonald; State (Ore) v	414	New Hampshire Jockey Club; Tanello v	834
McElveen; United States v	112	Newtown, Town of; Snyder v	741
Mannings v Bd of Public Instr of Hillsborough Co Fla, USCA 5th Cir, 277 F2d 370	370	New York, City of; Martin v	803
Marshall; Comn Against Discrim v	928	Norfolk, City of; Reid v	142
Marshall et al v Kansas City, Jackson Co Mo Cir Ct, July 1, 1960, No. 622,387	834	Norfolk, Sch Bd of; Beckett v	404
Martin; New Orleans Branch of NAACP v	467	O'Connor v City of Minneapolis, USDC Minn, 182 F Supp 494	413
Martinez v Southern Ute Tribe, USCA 10th Cir, 273 F2d 731	173	O'Neill; Oyama v	136
Martin v City of New York, NY Co Sup Ct Spec Term, 201 NYS2d 111	803	Orleans Parish Sch Bd; Bush v	378
Marva Theatres Inc; Jones v	151	Orleans Parish Sch Bd; State (La) v 72, 375, 655	
Matthews v Handley, USDC Ind, 179 F Supp 470	106	Orleans Parish Sch Bd v Bush, USCA 3rd Cir, June 2, 1960 Civ No 3630	655
Members of Bd of Ed, City of Atlanta; Calhoun v	374	Owen; Williams v	200
Minneapolis, Minn, City of; O'Connor v	413	Oyama v O'Neill, Pima Co Ariz Super Ct, No 61269	136
Mitchell; Progress Development Corp v	427	Pape; Monroe v	108
Monroe v Pape, USCA 7th Cir, 272 F2d 365	108	Parham; Dove v	43, 349, 631
Montgomery, City of v Gilmore	455	Parham v Dove, USCA 8th Cir, 271 F2d 132	43, 349, 631
Moore v Henslee, USCA 8th Cir, 276 F2d 876	484	Payne v. State, Ark Sup Ct, 332 SW2d 233	217
Munoz; People of State of New York v	762	Pennsylvania, Commonwealth of, v Gibney	475
Myers v State Bd of Public Welfare, Baltimore Cir Ct, July 1, 1960, Docket A-142	792	People; Devonish v	846
NAACP, New Orleans Branch of v Martin	467	People v Devonish, NY Co Sup Ct, Spec Term Pt I, 202 NYS2d 95	846
NAACP; Revenue Comr of Ga v	462	People v Ford, Ill Sup Ct, 168 NE2d 33	853
		People v Harris, Los Angeles Co Calif Super Ct App Dept, 5 Cal Rptr 852	762



<i>People v Munoz</i> , NY City Ct of Spec Sess App Pt 1st Dept, 200 NYS2d 957	762	<i>Savoy Theater; Jimmerson v</i>	914
<i>People v Sweeney</i> , Calif Dist Ct Appl 2d Dist Div 3, 5 Cal Rptr 379	845	<i>Schneckloth; Arquette v</i>	420
<i>Perry v Sch Dist No 81, Spokane</i> , Wash Sup Ct, 344 P2d 1036	85	<i>Schneckloth; White v</i>	420
<i>Peter Kiewit &amp; Sons Co; Taylor v</i>	127	<i>Sch Bd of City of Alexandria; Jones v</i>	81, 399
<i>Peterson; Ross v</i>	703	<i>Sch Bd of City of Norfolk; Beckett v</i>	404
<i>Pett't v Bd of Ed of Harford Co</i> , USDC Md, May 25, 1960, Civ No 11955	379	<i>Sch Bd of City of Norfolk v Beckett, USCA 4th Cir, 260 F2d 18</i>	404
<i>Power Authority of St of NY v Tuscarora Indian Nation</i> , USSC, 80 S Ct 543	16	<i>Sch Dist No 81, Spokane; Perry v</i>	85
<i>Prince Edward Co Va, Co Sch Bd of; Allen v</i>	412	<i>Seaton; Hayes v</i>	169
<i>Pritchett v State</i> , Ala Ct Appls, 117 So2d 345	112	<i>Seniors v Arnold</i> , USDC Ga, June 3, 1960, Civ No 7176	791
<i>Progress Development Corp. v. Mitchell</i> , USDC Ill, 182 F Supp 681	427	<i>Sexton et al; Byrd v</i>	750
<i>Pulaski Co Sch Bd; Crisp v</i>	721	<i>Shipp v White</i> ; USDC Tex, Mar 1, 1960, Civ No 2789	740
<i>Quesada; Airline Pilots Assn v</i>	749	<i>Shockley; Bd of Ed of Laurel Spec Sch Dist v</i>	104
<i>Raab v Syracuse Transit Corp</i> , NY SCAD, CA-6064-59	259	<i>Simon; Assn for Preservation of Freedom of Choice v</i>	808
<i>Raines; United States v</i>	11	<i>Slack v Atlantic White Tower System</i> , USDC Md 181 F Supp 124	202
<i>Real Est Comm of Md; Bernstein v</i>	153	<i>Sloan, State ex rel v Highlander Folk Sch</i>	91
<i>Reid v City of Norfolk</i> , USDC Va, 179 F Supp 768	142	<i>Smith v Flournoy</i> , La Sup Ct, 114 So2d 809; La Ct Appls, 117 So2d 320	117
<i>Revenue Comr of Ga v NAACP</i> , Fulton Co Super Ct, Atlanta Jud Cir, Mar 3, 1960, No A-58654	462	<i>Snyder v Town of Newtown</i> , Conn Sup Ct of Errors, 161 A2d 770	741
<i>Rhay; Charley v</i>	173	<i>Southern Ute Tribe; Martinez v</i>	173
<i>Rhone and Case, In the Matter of</i>	541	<i>Stafford v Super Ct, Los Angeles Co</i> , USCA 9th Cir, 272 F2d 407	106
<i>Richland Water Dist; Wiley v</i>	788	<i>State (Ala); Anderson v</i>	490
<i>Rippey; Borders v</i>	679	<i>State (Ala); Pritchett v</i>	112
<i>Rippey; Boson v</i>	392	<i>State (Ala); Woods v</i>	216
<i>Rizzo; Haifetz v</i>	108	<i>State (Ark); Payne v</i>	217
<i>Rogers; St of Ala ex rel Gallion v</i>	766	<i>State Bd of Public Welfare; Myers v</i>	792
<i>Ross; Evans v</i>	206	<i>State Comin Against Discrim v Trowbridge</i> , NY SCAD, April 29, 1960 Order CP-6194-59	552
<i>Ross; Houston Indep Sch Dist v</i>	703	<i>State ex rel City of Creve Coeur v Weinstein</i> , St Louis Mo Ct Appls, 329 SW2d 399	207
<i>Ross v Peterson</i> , USDC Tex, Aug 3, 12, 1960, Civ No 10,444	703	<i>State ex rel Gremillion v NAACP; New Orleans Branch of NAACP v Martin</i> , USDC La, 181 F Supp 37	467

<i>State ex rel Sloan v Highlander Folk Schl</i> , Grundy Co Tenn Cir Ct, No. 90	91	Studio Girl-Hollywood; Comn on Human Relations v	546
<i>State ex rel Steele v Stoutamire</i> , Fla Sup Ct, March 21, April 7, May 16, 1960	417	Sunset Memorial Park Assn; Erickson v	186
<i>State (Fla); Hoyt v</i>	501	Superior Ct for King Co Wash, Juvenile Ct; St v	94
<i>State (NC); Wolfe v</i>	333	Superior Ct, Los Angeles Co; Stafford v	106
<i>State of Ala ex rel Gallion v Rogers</i> , USDC Ala, Aug. 11, 1960, No 1616-N	766	Sweeney; People v	845
<i>State of California; Talley v</i>	607	<i>Sweet v Leon</i> , Santa Clara Co Calif Super Ct, Dec 1959, No. 110331	472
<i>State of Illinois; Truitt v</i>	750	Syracuse Transit Corp; Raab v	259
<i>State of Oregon v McDonald</i> , USDC Ore, 180 F Supp 861	414	Tallahassee; Steele v	417
<i>State (Tenn); Kasper v</i>	418	<i>Talley v State of California</i> , USSC, 80 S Ct 536	607
<i>State (Tex); Stoker v</i>	489	<i>Tamelleo v New Hampshire Jockey Club et al</i> , N H Sup Ct, 163 A2d 10	834
<i>State (Tex); Williams v</i>	507	<i>Taustine v Thompson</i> , Ky Ct Appls, 322 SW2d 100	233
<i>State v Brooks</i> , SC Sup Ct, 111 SE2d 686	232	<i>Taylor v Peter Kiewit &amp; Sons Co</i> , USCA 10th Cir, 271 F2d 639	127
<i>State v Bullock</i> , SC Sup Ct, 111 SE2d 657	221	<i>Tenn Negro Funeral Dir Assn v Bd of Funeral Dir and Embalmers</i> , Tenn Sup Ct, 332 SW2d 195	416
<i>State v Drews</i> , Baltimore Co Md Cir Ct, May 6, 1960, Crim No 20084	469	<i>Texas-Zinc Minerals Corp v Steelworkers of America</i> , NLRB No 20-RC-3851	281
<i>State v Dunlap</i> , NJ Super Ct App Div, 161 A2d 760	854	Thomas; United States v	11, 302
<i>State v Fass</i> , Hudson Co NJ Co Ct Law Div (Crim), 162 A2d 608	839	Thompson; Taustine v	233
<i>State v Holy-Elk-Face et al</i> , NDak Sup Ct, 104 NW2d 308	808	<i>Thompson v City of Louisville</i> , USSC, 80 S Ct 624	7
<i>State v McConville</i> , Idaho Sup Ct, 349 P2d 114	230	<i>Tonkins v City of Greensboro</i> , NC, USCA 4th Cir, 276 F2d 890	460
<i>State v Orleans Parish Sch Bd</i> , Orleans Parish La Civ Dist Ct No 364-133; La Sup Ct, 118 So2d 127; La Ct Appl, 118 So2d 471; Orleans Parish Civ Dist Ct, July 29, 1960, No 383,646	72, 375, 655	Transworld Airlines; Airline Stewards & Stewardesses Assn Internatl v	129
<i>State v Super Ct for King Co, Juvenile Ct</i> , Wash Sup Ct, 346 P2d 999	94	Trowbridge; NY SCAD v	552
<i>Steele, State ex rel v Stoutamire</i>	417	<i>Trowbridge v Katzen</i> , Ulster Co NY Sup Ct, Spec Term, 203 NYS2d 736	837
<i>Steele v City of Tallahassee</i> , Fla Sup Ct, March 21, April 7, May 16, 1960	417	<i>Truitt v St of Illinois</i> , USCA 7th Cir, 278 F2d 819	750
<i>St Helena Parish Sch Bd; Hall v</i>	655	Trustees of Amherst College; Howard Savings Inst of Newark v	387
<i>Stoker v State</i> , Tex Ct Crim Appls, 331 SW2d 310	489	Tucker; Aaron v	615
		Tuscarora Indian Nation; Fed Power Comn v	16

United States; Braden v	176	Warwick Hotel; Foster v	538
<i>United States in behalf Pueblo of San Ildefonso v Brewer</i> , USDC N Mex, 184 F Supp 377	807	Weinstein; State ex rel City of Creve Coeur v	207
<i>United States v State of Alabama</i> , USSC, 80 S Ct 924	301	White; Shipp v	740
<i>United States v Assn of Citizens Councils of La</i> , USDC La, July 27, 1960 Civ No 7881	773	<i>White v Schneckloth</i> , Wash Sup Ct, 351 P2d 919	420
<i>United States v DeFillo</i> , USDC NY, 182 F Supp 782	506	<i>Whyte v Dist Ct of Montezuma Co</i> , Colo Sup Ct, 346 P2d 1012	170
<i>United States v Fayette Co Democratic Exec Comm</i> , USDC Tenn, April 25, 1960, Civ No 3835	421	<i>Wiley v Richland Water Dist</i> , USDC Ore, June 30, 1960 No C 60-207	788
<i>United States v McElveen</i> , USDC La, 180 F Supp 10; USCA 10th Cir No 18169	112	<i>Williams v Central of Ga Ry Co</i> , USDC Ga, 178 F Supp 248	129
<i>United States v Raines</i> , USSC, 80 S Ct 519	11	<i>Williams v Davis</i> , USDC La, 187 F Supp 42	655
<i>United States v Thomas</i> , USSC, 80 S Ct 398; 80 S Ct 612	11, 302	<i>Williams v Owen</i> , USDC Ill, 179 F Supp 268	200
United Steelworkers of America; Texas-Zinc Minerals Corp v	281	<i>Williams v State</i> , Tex Ct Crim Appls, 335 SW2d 224	507
Vic Tanny Compton Inc; Gardner v	831	<i>Willie v Harris Co</i> , USDC Tex, 180 F Supp 560	146
<i>Walker v Floyd Co Sch Bd</i> , USDC Va, Sept 23, 1959, Sept 8, 1960 Civ No 1012	714	<i>Wilmington Parking Authority v Burton</i> , Del Sup Ct, 157 A2d 894	194
Warden of Md Penitentiary; Galloway v	231	<i>Wolfe v State (NC)</i> , USSC, 80 S Ct 1482	333
		<i>Woods v State</i> , Ala Ct Appls, 116 So2d 400	216
		Yates, Application of	112
		Young; Carr v	101











